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2703

No. 13027

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**In the  
United States Court of Appeals  
For the Ninth Circuit**

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CATHERINE HEIN,

*Appellant,*

— vs. —

JOHN R. CRANOR, Superintendent of the Washington  
State Penitentiary at Walla Walla, Washington,  
*Appellee.*

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APPEAL FROM JUDGMENT OF THE DISTRICT COURT  
OF THE EASTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

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**BRIEF OF APPELLANT**

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JAMES TYNAN,

*Attorney for Appellant.*

409 Colby Building, Everett, Washington.

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In the

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CATHERINE HEIN, *Appellant*,  
vs.

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Walla Walla, Washington, *Appellee.* }

APPEAL FROM JUDGMENT OF THE DISTRICT COURT  
OF THE EASTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

## BRIEF OF APPELLANT

### OPINIONS BELOW

The opinion of the district judge is in form of a letter and is set out in the record (R. 512-517). The Findings of Fact and Conclusions of Law are at R. 529. The remarks of the trial judge in the state criminal trial are set out at R. 322-330. The opinion of the Washington Supreme Court in the appeal of the criminal conviction is reported in *State v. Hein*, 32 Wn.2d 315, 201 P.2d 691. The opinion of the state court judge in the habeas corpus hearing is set out in the record (R. 490-503). The opinion of the supreme court affirming the order dismissing the writ is reported in *In re Hein v. Smith*, 35 Wn.2d 688, 215 P.2d 403. The denial of certiorari by the Supreme Court is reported in 340 U.S. 837.

## JURISDICTION

The judgment denying the petition for habeas corpus was entered April 18, 1951 (R. 538). Notice of appeal was filed May 10, 1951 (R. 550). A certificate of probable cause was signed and filed May 10, 1951 (R. 548), and an order granting leave to appeal in forma pauperis was entered May 10, 1951 (R. 548).

Jurisdiction of the district court is based upon U.S. C.A., Sections 2241-2243. This appeal is taken pursuant to the certificate of probable cause under authority of U.S.C.A., Section 2253.

## QUESTIONS PRESENTED

Whether the conviction in a state court of a 14-year old boy for murder should be allowed to stand, when the conviction is based entirely upon confession evidence, and

(1) The written confession is denied by the defendant and the state has never proved it to be a confession;

(2) The instrument, a private paper having no connection with the crime, was forcibly taken from him and read to the jury over his objection;

(3) There is no corroboration of the supposed confession in the way of substantive, tangible evidence to connect him with the crime;

(4) He was denied a fair trial because . . .

(a) A police officer was permitted to testify to poorly heard statements made to the officer while in custody;

(b) The prosecutor's stenographer was permitted to testify that denials of guilt made in her presence were not convincing;

(c) It was insinuated that the boy was a dangerous character who might be expected to commit crime; and

(d) The trial was in other respects unfair.



## STATEMENT OF THE CASE

This is an appeal from a judgment of the district court for the Eastern District of Washington dismissing a petition for a writ of habeas corpus. The petitioner is the mother of a prisoner held in state custody in the penitentiary pursuant to a judgment of conviction of first-degree murder in the Superior Court of Snohomish County, Washington, and life sentence based thereon. The prisoner was 14 years of age when convicted, and is now 17. The proceeding was commenced by the filing of a petition and an order to show cause issued by the district judge (R. 1-11). The state appeared by the Attorney General and filed an answer (R. 12).

The petition alleges that rights arising under the Constitution of the United States were violated, particularly with respect to the seizure and use of confession evidence. The answer is a general denial and an affirmative defense of *res judicata* arising from certain proceedings in the state courts.

Records were preserved of all proceedings in the state courts and these were admitted in evidence by stipulation (R. 36-37). From these the following facts appear:

In March, 1948, Richard Hein was tried and convicted of murder in the first degree in the Superior Court of Snohomish County, Washington. The principal item of evidence was a "confession" in his own handwriting (R. 206). All that we know about this instrument came from the defendant himself. It was written by the boy, who was a pupil in junior high

school, in school, on Wednesday, the day after the discovery of the murder (R. 264). The evening before he learned from the neighbors (R. 253) the facts concerning the crime. From this and newspaper accounts (R. 256), he was able to give a first-person narrative of the events which appeared to be an actual confession.

Richard was 14 years of age when he was tried (R. 862). He lived with his mother and step-father in Hartford, Washington. There were two other children in the family, a girl, twelve, and a boy, ten (R. 883). He had attended school at Lake Stevens up to the beginning of the term which began in the fall of 1947 (R. 1211). Then, during the ninth grade, he transferred to the North Junior High School in Everett. He was an average student (R. 266).

His school principal described Richard as an imaginative boy, but not vicious. In his words:

"He was sort of an individual as far as control is concerned. He liked to have notoriety and attention but he never demonstrated any vicious tendencies in school." (R. 1212, 1213)

The murder was discovered Tuesday, November 18, 1947. Two suspects were arrested immediately. One of them, who was held three or four days, later testified for the state (R. 1003-1005). Toward the end of the week Refsnes, a deputy sheriff, learned that some children attending the junior high school had been talking about the murder (R. 1388). On Monday he and another deputy sheriff, Weaver, went to the school and talked to Joe Jensen, a boy 14 years of age. He said that Richard had told him about the murder

but he thought it was only bragging talk (R. 1115); later he told this to the prosecutor (R. 1122). Richard was then picked up for questioning.

Taken to the jail, Richard asked to be allowed to call his folks but was not allowed to do so (R. 143). The prosecuting attorney was there, and in addition, to the two deputy sheriffs who made the arrest, the undersheriff Jackson was present. Phyllis Mootz, the prosecutor's stenographer, took notes which were made a part of the record in the state habeas corpus proceeding (R. 196, 504-509).

Richard was told he did not have to talk, but was not told that what he might say would be used against him (R. 155). The prosecutor conducted the questioning, with Weaver taking a hand toward the end. Jensen was asked to repeat what he had said at the school. This he did, emphasizing again that he thought Richard was talking for the fun of it (R. 505). But when it appeared that Joe was saying that Richard knew about the crime before it was discovered, Richard became angry and threatened Joe (R. 194). Jackson then grabbed Richard by the arm and told him to sit down, and that "if he was a man I would box his ears for him" (R. 162).

While the interview was in progress Jackson remarked that Richard had not been searched (R. 195) and he was told to empty his pockets, and did so (R. 271). He was then taken out of the room while the officers went through his things (R. 272, 375).

Among Richard's possessions was a billfold, and in it was a writing (R. 141), reading as follows:

"Nov. 17, 1947

"I, Dick Hein, better known as Richard Hein, am going to write a confession to the murder of James Moore Residence of Lake Stevens Washington. This is how it happened: I was walking around the neighborhood smoking. When I thought I would go in and find out how Jims wife was getting along at the hospitle at Monroe. We talked for about five minutes. Then I pick up a cane. Smash the light bulb. And start beating Jim. I busted the cane all to hell on his head. then I hit him with a heavy piece of wood. He still grouned with pain so I took up a knife, and cut his throat and took the money he had with him which amounted to \$15.80 and got out of there.

Dick or Richard Hein  
P.O. Box 99  
Hartford, Wash."

This is the document which was admitted as Exhibit "H" in the trial of Hein.

Upon his return to the room the defendant was asked if the writing was his. He admitted its authorship and said he wrote it in study hour in school one day. When the prosecutor charged him with having written it November 17th (the murder was not discovered until the 18th), he said, "Not the seventeenth, I could have dated it back." When the prosecutor suggested he would feel better if he got the story out of his system now, he answered: "I didn't kill him so what the hell have I got to worry about" (R. 508).

He added, in response to the prosecutor's questions, and referring to the conversation with Jensen, "I didn't tell him a damn thing Monday or Tuesday,

either one;" and, "I told him all that I read in the paper" (R. 509).

When Jensen was asked if there was anything else, he said Richard felt pretty proud of it because they had two other guys up there (R. 507). After a few other questions the prosecutor returned to this and asked him how he could have told about it before the murder was discovered when the two suspects had not been arrested yet. Jensen answered, "That's right, I could be mistaken about the date" (R. 508, 1261).

At the conclusion of the interview, which lasted nearly an hour (R. 1366), Richard's mother was called to get the parents to go to the home so that a search could be made (R. 226). No clues were discovered.

The boy was held in jail, but not booked. Later that night the deputy Walker came on duty and, surprised to find the boy there questioned him. This conversation is set out later in this brief (p. 56).

Sometime later a hearing was held before the juvenile court and the boy was bound over for trial (R. 1255). He was not charged until December 6th in the Justice Court; the charge upon which he was convicted was filed in the Superior Court December 18th (R. 1256). He has been in custody since the jail interview.

Prior to the trial the defendant, who was represented by counsel, moved to suppress the evidence taken from him on arrest. Affidavits and counter-affidavits were filed (R. 568 - 580) and the matter

came on for hearing before Judge Bell, who afterwards presided at the trial. After considering the affidavits, the court granted a continuance (R. 1227) to enable the prosecutor to file additional affidavits (R. 581-583). Upon the showing contained in the new affidavits, the court denied the motion to suppress (R. 584, 1228).

Upon the trial of the case, the prosecuting attorney in his opening statement related to the jury the finding of the writing upon the defendant's person, and, over objection, told them its contents (R. 136). Several witnesses testified for the state as to the circumstances of its finding (R. 141, 149, 163). Upon the state's case in chief, and with no other foundation, the confession was offered in evidence (R. 200). Over strong objection on constitutional grounds (R. 200-204), it was admitted and read to the jury (R. 205).

In addition to the writing the prosecutor relied upon the testimony of Joe Jensen, Inez Pitzer, and Ruth De Monbrun, all minor children, schoolmates of the defendant. Inez testified that the defendant told her about the murder, and she thought it was before the news was published in the paper (R. 170). Ruth overheard the conversation but did not know when it occurred and did not look at the paper (R. 174). The third witness, Jensen, the boy who was at the jail interview, answered a leading question of the prosecutor that the defendant told him "around November 17th, 1947" (R. 178) that the defendant killed Moore.

A knife was introduced in evidence (R. 825). This

knife came out of the Moore home, from which several knives were taken by the authorities the night the murder was discovered (R. 1372, 1392). The particular knife was supposed to have been found in a trash pile near the house, by a prisoner searching under the supervision of the sheriff's deputies (R. 629-630). The prisoner, Walter Johnson, was never called to the stand, and after the Hein trial was over he was taken before the court and received a suspended sentence on a charge of grand larceny (R. 1293-1296). He has since disappeared (R. 1235-1238). It was never shown that the defendant had anything to do with this knife.

In the district court it was shown that the sheriff was at all times in possession of a cleaver taken from the Moore home, but its existence was not brought to light. There was also evidence that it was more likely that the cleaver was the death weapon (R. 85-92). There is no evidence as to finger prints at any point in the case. The prosecutor's brief on appeal in the criminal cause says it was impossible to determine fingerprints on any of the articles. Whether this includes the knife or cleaver does not appear.

There was evidence that the defendant was in possession of an unusual amount of money on the Sunday before the body was discovered. Mary Ann Hendrickson testified that he was in a grocery store where she worked, on Saturday, and that the deceased was in the store at the same time. The deceased made a small purchase (R. 837).

After reading the "confession" to the jury (R. 206)

the state rested. Without making any motion, the defense proceeded to put in its case. The defendant's parents testified to his whereabouts and conduct during the time in question (R. 207-236). The defendant testified to his activities also (R. 240-294). He told how the note came to be written (R. 264). He denied any knowledge of the crime (R. 265). He testified that he did not show the note to anyone, but put it in his pocket and forgot about it (R. 267). He said the conversations with the other children occurred on Wednesday (R. 262). He testified that Oscar Magnuson gave him the money he had on the Sunday before the discovery of the crime (R. 279). On rebuttal Magnuson denied that he gave the boy money (R. 295-310).

No motion for directed verdict was made, and the case was submitted to the jury. No instruction was given the jury touching the confession, nor were they given the option to disregard it if they found it false. It appears one of defense counsel was not present throughout the very final stages of the cause (R. 324). On motion for new trial the judge gave his reasons for not giving an instruction (R. 323). Neither side asked for such instruction, and he was afraid that if he gave the one he had prepared it might draw undue attention to the matter.

The defendant was convicted without the death penalty, it having been stipulated that might be withdrawn from consideration of the jury (R. 1018). He was sentenced to the penitentiary for life, where he now is. The judgment was affirmed by the supreme court, *State v. Hein*, 32 Wn.2d 315, 201 P.2d 691.



### Other Proceedings in State Court

These proceedings in the federal court follow an unsuccessful effort in the state court to secure the release of the prisoner, or to obtain a new trial. The proceedings in the state court were by a petition for a writ of habeas corpus (R. 338) under the provisions of the Washington law of 1947 (Sec. 1075, Rem. Rev. Stat.) which permits a post-trial hearing where the petition alleges that rights guaranteed by the Constitution of the United States have been violated. The petition in the state court makes these allegations. Pursuant thereto the state appeared by the Attorney General and filed an Answer (Supp. R. 1) and a hearing was had. The court ruled against petitioner (R. 510). An appeal was taken to the supreme court of the state which affirmed the trial court's judgment. *In re Hein v. Smith*, 35 Wn.2d 688, 215 P.2d 403.

A petition for a writ of certiorari was filed in the Supreme Court of the United States to review the decision of the state court, and was denied. *Hein v. Smith*, No. 40, Misc., October Term 1950, 340 U.S. 837.

In the habeas corpus hearing Jensen testified that he perjured himself in saying that Richard told him about the crime on November 17th. He said that the conversation occurred on Thursday, two days after the discovery of the crime; that it was in the newspapers at the time, and that the defendant had a newspaper containing an account of it with him (R. 365, 448). He swore that he gave false testimony because he was threatened with the reform school or prison

if he did not testify the way the sheriff wanted (R. 390, 391).

While the appeal in the above habeas corpus case was pending the prisoner filed an affidavit for a new trial under the Washington practice referred to in *Hampson v. Smith*, 153 F.2d 417. Judge Bell refused to issue a show-cause order and the matter was taken to the supreme court by petition for mandamus. The court approved the judge's action by denying a writ of mandate. See Wash. Supreme Court, Cause No. 31375, filed as an exhibit here. State remedies have, therefore, been exhausted.

### **Proceedings in the District Court**

After the denial of certiorari by the Supreme Court the petitioner filed the present petition for a writ of habeas corpus in the district court for the Eastern District of Washington, where the penitentiary is (R. 1). An order to show cause was issued (R. 11), and the respondent appeared by the Attorney General of Washington and filed an answer (R. 12). Upon the issues thus made up a hearing was had at Walla Walla, Washington, on December 12, 1950, at which time witnesses were examined, including the prisoner (R. 37-47). He was not cross-examined (R. 48).

The new evidence at this hearing included two tests, a "lie detector" test, administered July 18, 1950, and a "truth serum" test administered September 9, 1950. The technician who administered the first test was not available (R. 75), but a letter from him in which he expressed the opinion the boy could not be guilty (R. 121), was offered and received in evidence

(R. 76). The physician who administered the truth serum or penathol (R. 51) testified, and Don Magnuson, a reporter for the "Seattle Times," who prepared the questions which were asked (R. 102-121) also testified (R. 67-82). The full record of this test was admitted (R. 69; Ex. 1). Webb Sloane, a Washington State patrolman for 14 years (R. 63), was present at the tests and asked a number of questions of the prisoner (R. 119-121). He testified he was satisfied with the answers (R. 64).

Other testimony related to the cleaver which could have been the death weapon. After the judgment of conviction it was discovered that the sheriff had a cleaver which had been taken from the house where the murder was committed (R. 87). In the present proceeding demand was made upon the state that it be produced (R. 16). The state admitted that it was still in the hands of the sheriff (R. 17), who made an affidavit (R. 20) that in his opinion it was not the death weapon. This evidence bears upon the allegations in paragraph XI of the petition (R. 5).

At the conclusion of the hearing the court then took the case under advisement.

On March 22, 1951, a letter was received from the district judge setting forth his views, and the conclusion that the petition should be denied (R. 512-517). Petitioner filed a motion for new trial (R. 539), and proposed findings. The matter came on again before the court sitting in Seattle. The motion for new trial was denied. The court made one change. In his letter he refers to an affidavit of Joe Jensen dated August 4, 1949, in which he said supported his views

(R. 515, line 14). At the hearing he decided that this affidavit should be disregarded (R. 519) and no finding was made concerning it. The proposed findings were refused, and they were not included in the record.

The letter, after referring to the principle that habeas corpus does not involve guilt or innocence and that the only question is whether the constitutional rights of the defendant were violated, states that the confession was *written voluntarily*. Having been taken from the prisoner upon a lawful arrest, it could be used by the state as evidence (R. 513). Considerable space is devoted to this but no mention is made of petitioner's contention that the *surrender* of the document was *compelled*.

The contention that the writing was not a confession at all was answered by saying that the question was wholly for the jury, and that their verdict foreclosed the discussion (R. 514).

The judge further ruled that Joe Jensen did not commit perjury at the trial of Richard Hein (R. 514). He felt that the conclusions of the state court judge should be given great weight because he saw and heard the witnesses. Jensen's affidavit of August 4, 1949, which was subsequently discarded, entered into his reasoning on this phase of the matter (R. 515).

Answering petitioner's contention that the knife introduced in evidence was not the death weapon; that the cleaver which the sheriff took from the house and which he had in his possession during all this time (R. 17) was more likely the weapon; that the

knife was planted, and "found" in order to substantiate the imaginary confession (which refers to a knife), the judge ruled that it was the knife which produced the wounds (R. 515), and that no evidence was suppressed.

The lie detector and truth serum tests were held to be without value on the issues presented by the petition (R. 515).

Bearing in mind the constitutional doctrines involved, the judge was of opinion that the boy had a fair trial. And, because he had been afforded a full hearing in the state court upon the contentions now advanced, he felt it doubtful if he had acted properly in entertaining the petition in the first place. The denial of certiorari was given considerable weight in this connection (R. 517).

With the exception noted as to the affidavit of Jensen, the letter was carried into the findings of fact and conclusions of law (R. 529), and judgment denying the petition (R. 538), entered April 18, 1951.

### **ASSIGNMENTS OF ERROR**

The district judge erred:

1. In giving undue weight to the findings and opinions of state court judges.

2. In allowing his decision against petitioner to be influenced by the fact that the Supreme Court denied certiorari.

3. In holding that the confession was voluntary.

4. In holding that the jury had the right to consider the confession.

5. In assuming there was some tangible evidence to connect the defendant with the crime.

6. In holding that the defendant had a fair trial and that no rights secured to him by the Constitution of the United States were violated.

## SUMMARY OF ARGUMENT

### I.

The production of the writing, Ex. "H" in the criminal trial, assuming that it is in fact a confession, was compelled; and it cannot, therefore, form the basis of a conviction. While, under the rule of *Wolf v. Colorado*, 338 U.S. 25, the manner of procuring evidence by the state may not be a federal concern, confessions are in a different category and can be made use of only if they are voluntary. The manner of compelling the production of this writing renders it involuntary in the eye of the law. *United States v. Abrams*, 230 Fed. 313. An involuntary confession cannot be used for any purpose. *In re Fried*, 161 F.2d 453. Its surrender under duress, even though no physical pressure was used, and its use at the trial, renders the trial a nullity. *Haley v. Ohio*, 332 U.S. 596.

### II.

In determining whether a confession has been made, it is necessary to consider the personality of the alleged confessionalist. Wigmore on Evidence (Revised Ed.) Sec. 866.

Here we have a 14-year old boy, of good reputation, who stands fair in his studies and in whom his school principal saw nothing vicious. He attended school on the day the murder was discovered and on the day

before. He came home the evening of the finding of the body, and from neighborhood gossip learned the details of the crime. Next day he read the morning paper, giving further news of it. In school that day he wrote out an imaginary account of the murder, naming himself as the killer. He testified that it was done for foolishness, and to this day no one has been able to dispute him, nor has there been the slightest thing to connect him in any way with the crime. His whereabouts during all the period were fully accounted for, and nothing in his conduct then or now betokens guilt.

Under these circumstances this instrument should have been rejected as worthless. At first blush, it has a semblance of verity because Joe Jensen said that Richard told him a similar tale before the murder was discovered. But when the discrepancy concerning the arrest of the two suspects was pointed out, he changed his story and said he could be mistaken about the dates.

Jensen said he thought Richard was bragging, was telling him simply for the fun of it. Inez Pitzer, another schoolmate, to whom he had also bragged, asked him why he killed the man; he answered, "Just for the hell of it." She told this to the prosecutor. Surely this was enough to show that that there was no confession in fact.

The state trial judge felt there were grave doubts whether the document was a confession, but he left the matter to the jury without any instruction. They were not even told they might disregard it if they found it false. But the trustworthiness of a confes-

sion, as well as its voluntary character, are questions of law. They are not foreclosed by a jury verdict. *Ashcraft v. Tennessee*, 322 U.S. 143. The district judge committed the same error.

Another basic error is that if the confession is not admissible as such, it is somehow admissible as "having evidentiary value"; in other words, it is circumstantial evidence. But we submit, if it isn't a confession, it isn't anything. In *Bram v. United States*, 168 U.S. 532, it was sought to sustain coerced statements from which guilt could be inferred on the ground that they were not confessions because they were in form at least, denials of guilt. But the court answered that the only hypothesis upon which they were offered was that they tended to prove guilt; since they were shown to be involuntary they were inadmissible as confessions; consequently, they were inadmissible altogether. That is the case here.

Another basic error in reasoning is that because the confession was secured as a result of a search upon a lawful arrest, it is admissible. But a search does not make inadmissible evidence admissible. Articles or papers seized during the course of a search, which it is unlawful for the arrested person to have and which may be used to prove the offense, may be taken and held for use as evidence, *Carroll v. United States*, 267 U.S. 132; but private papers, which are not themselves forfeitable, may not be taken. *United States v. Friedberg*, 233 Fed. 313. The search adds nothing to the value of the confession, and cannot sustain its unlawful use by the state.



Corroboration of a confession is required. There must be some evidence to connect the accused with the crime. This is not furnished by corroboration that he confessed, which is all that appeared here (and the most important evidence of that was later shown to be perjured). As in *Ashcraft v. Tennessee*, 322 U.S. 143, 168, investigation has failed "to unearth a single tangible clue pointing to the guilt of the defendant." There was nothing to show that the boy was in any way connected with the events described in the confession, and if we give credence to his alibi, it was quite impossible for him to have been there. The alibi evidence should be believed, because there is nothing in the record to cast doubt upon it. *United States v. Lee Heun*, 118 Fed. 442.

### III.

A state must observe certain standards in the administration of its criminal law. While it is "free to devise its own way of securing essential justice," it cannot, as Mr. Chief Justice Hughes observed in *Brown v. Mississippi*, 297 U.S. 278, substitute trial by ordeal. The things set up and established in this case are not mere matters of evidence, of details in the conduct of an essentially fair trial. They are fundamental wrongs.

The treatment of the written instrument was a failure to observe fundamental fairness. Essentially, the procedure was to shift responsibility to the jury. That was the device the states used to escape responsibility for the brutally coerced confessions which for a time disgraced the records of our crim-

inal trials, particularly where Southern Negroes were involved. But the Supreme Court placed the responsibility for determining the validity of confessions where it has always belonged, upon the judges. *Ashcraft v. Tennessee*, 322 U.S. 143. That duty cannot be evaded by calling the confession circumstantial evidence; by saying that its truth or falsity is for the jury, when there is no evidence to support a hypothesis of truth; or by saying that the jury may have it, for whatever value it may have, because the officers took it from the defendant during a routine search. If it is not a confession,—and even if it is, and it was unlawfully obtained,—it should be excluded. Since that was not done the conviction is fatally tainted by the unlawful evidence.

Even those who argue that the stand taken by the Supreme Court against confessions resulting from police interrogation is too strict, Cf. dissenting opinion in *Ashcraft v. Tennessee*, 322 U.S. 156, concede that a confession is not valid unless the accused has the right “to resist, to admit or deny, or to refuse to answer (322 U.S. 170). *Lisbena v. California*, 314 U.S. 219.” No choice rested in the prisoner here.

It will not do to say that it was voluntary because it was composed and written without pressure. It derived its effectiveness from communication; before that it was nothing. It was made use of by first compelling the boy to surrender it up, and then by forcing him to admit that he wrote it. When these things were accomplished it was admitted in evidence at the trial, and we can have no doubt it was the

thing that enabled the jury to bring in the verdict of conviction.

On the same day that the confession was surrendered, a deputy sheriff, Walker, had the boy alone in the jail. He asked him if he committed the murder. At the trial he was permitted to repeat the boy's answer, as he remembered it four months later. He said it sounded like, "Uh-huh, but they'll have to prove it on me." This testimony violates the rule laid down in *Bram v. United States*, 168 U.S. 532, reaffirmed in *Watts v. Indiana*, 338 U.S. 49, that trials in our courts follow the accusatorial, rather than the inquisitorial, system, and that the results of police interrogation may not be shown to establish an inference of guilt. Such procedure was held to be a violation of the Due Process clause of the Fourteenth Amendment in *Ashcraft v. Tennessee*, 322 U.S. 143.

At the trial Phyllis Nootz, the prosecutor's secretary and stenographer, who was present at the jail interview, was called as a witness to identify the confession and to establish that the boy admitted writing it. Counsel for the defendant, on cross-examination, asked her to admit what the undersheriff Jackson had already said (R. 167), that the boy denied committing the murder. She answered by saying that yes, he denied it, but the denial was not emphatic, and left her with a feeling of doubt as to whether he was telling the truth. This testimony also violates the rule above referred to. Even if we admit that a state may remove the privilege against self-incrimination, this kind of thing could not be sanctioned.

It compels a person to testify against himself by a form of coercion that violates due process. *Adamson v. California*, 332 U.S. 46. For even if the defendant could be compelled to explain his apparent connection with a crime, it is not fair on so vital a matter, to allow the prosecutor to put a fatal construction on his words. The prosecutor here was giving his opinion through his paid employee. The admission of this evidence renders the proceedings so unfair that they should not be allowed to stand.

Successful efforts were made to get the jury to believe they were dealing with a bad boy, a dangerous character who should not be allowed at large. There can be no doubt that this influenced the verdict.

The argument to the jury was not taken down, so it is not preserved in the record. We can infer, however, from the opening statement and the prosecutors' conduct throughout, that it was not characterized by indulgence toward a boy's foibles. Counsel for the prisoner who took the lead during state's case was not present during the "very final stages of the cause." And because the boy who had committed no murder, wrote a note saying he did—and the unfair tactics mentioned—appellant's son is spending his life in the penitentiary.

## ARGUMENT

## I.

The conviction is based upon confession evidence, and the confession having been compelled, the conviction is void as contrary to due process of law.

*A. The officers compelled the 14-year-old defendant to surrender up the writing upon which he was convicted.*

When Jackson remarked during the jail interview that Richard had not been searched, Refsnes ordered him to lay his things out on the table (R. 163, 195, 141). According to Richard (R. 272) and Joe Jensen (R. 375), he was then taken out of the room while the officers went through his things. When he was returned the questioning was resumed.

On his trial the defendant testified:

“Q How come you emptied your pockets?

A They asked me to, and told me to. You might just as well do it. It was just as if they were telling you to \* \* \*. I had a pen and I had some keys, and my wallet, and I can't think of much else \* \* \*. I laid them on the desk \* \* \*. They put me in another room while they went through my stuff.” (R. 271)

Richard was loath at first to admit the writing was his, but did not deny it. He did deny, however, that he committed the murder, and denied he told Jensen anything before the discovery of the crime (R. 504-509).

It is quite clear that this was not a voluntary disclosure. The boy had no choice but to hand over his possessions. Nobody had ever seen the writing; its

contents had never been communicated. It was his and his alone. Indeed, he had forgotten that he had it. Yet he was required at the command of the police officers to surrender it up. Such action was not voluntary.

“It would disregard standards that we cherish as part of our faith in the strength and well-being of a rational and civilized society to hold that a confession is ‘voluntary’ simply because the confession is the product of a sentient choice. ‘Conduct under duress involves a choice’ \* \* \*, and conduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint.” *Haley v. Ohio*, 332 U.S. 596, 606, 92 L. ed. 224.

Furthermore, it is a *confession* we are dealing with. A confession, to be admissible, must be voluntary. If it is in any manner coerced or compelled it cannot form the basis of a conviction. *Ashcraft v. Tennessee*, 322 U.S. 143; *Malinski v. New York*, 324 U.S. 401. The boy did not at any time adopt this writing as a true account of something that had happened; on the contrary, he declared it was not true.

Papers taken from an accused under circumstances rendering the disclosures involuntary cannot be used to convict.. In *United States v. Abrams*, 230 Fed. 313, two customs agents entered petitioner’s place of business and took private papers away. These papers were afterwards used to show admissions of guilt. The court held their delivery was not voluntary, and the conviction thus obtained was void. The court said:

“None of the papers were voluntarily delivered

to the officers. They were all obtained by the promise or threat that it would be better for the defendant if he gave Mr. Chandler what he wanted. This promise or threat influenced the defendant to part with his papers, and makes their delivery involuntary in the eye of the law.

\* \* \*. *The delivery of these papers may be likened to a confession, which is incompetent because not voluntarily made. Bram v. United States*, 168 U.S. 532. Do the same reasons and rules apply to obtaining from a defendant papers which contain evidence of crime as would apply in obtaining an oral admission of crime from him? The same reasons and rules should and do apply, and the fact that the evidence thus obtained is written makes no difference. The defendant's constitutional rights are as much violated in the one case as in the other." (Emphasis added)

In *Bram v. United States*, 168 U.S. 532, the court held that disclosures to a police officer while in custody should not have been admitted. It was held contrary to the law of nature that man be made the deluded instrument of his own destruction, and that the use of disclosures made as the result of police pressure violated the Fifth Amendment.

*Ashcraft v. Tennessee*, 322 U.S. 143, teaches us that a conviction based upon such evidence violates the Fourteenth Amendment. In that case there was no evidence of the participation of either Ashcraft or his co-defendant Ware in the crime, except the statements made while in custody. The court held that the convictions could not stand where there was even a hint of pressure to exact the confessions.

The matter was again before the court in *Watts v. Indiana*, 338 U.S. 49. The court took occasion to reiterate what was said in the *Bram* case: that ours is the accusatorial, as opposed to the inquisitorial, system. The state is bound to produce evidence to convict the prisoner—not out of his own mouth. A man may not be used to destroy himself.

There was no substantive evidence in the case at bar. All we have are the defendant's supposed admissions, and even these were not made with intent to confess. Such disclosures cannot be deemed voluntary. As was said by Mr. Justice Brandies in *Zing Zung Won v. United States*, 266 U.S. 1:

“In the Federal Courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary, if, and only if, it was, in fact, voluntarily made.”

And the rule in Washington is that an act done at the command of a police officer cannot be deemed voluntary. *State v. Miles*, 29 Wn.2d 921, 190 P.2d 740.

***B. The compulsory production of a confession cannot be justified by a showing that there was a lawful arrest.***

The opinion of the district judge on this phase of the case reads as follows:

“It should be noted that the document in the handwriting of Richard Hein which purported to set forth the manner in which he committed the murder, was written by him of his own accord and was entirely voluntary so that it could not be said that it was, in any sense, a coerced or improperly induced confession. It was taken



from him by state officers and used as evidence in a state court. The federal Fourteenth Amendment, therefore, would not forbid its use as evidence as the fruit of an unreasonable search and seizure. *Wolf v. Colorado*, 338 U.S. 25; *Elwood v. Smith*, 9 Cir. 164 F.2d 449. And the Fourteenth Amendment does not make applicable to the state the provision of the Fifth Amendment that no person shall give evidence against himself in a criminal case. *Adamson v. California*, 332 U.S. 46."

Now the Fourteenth Amendment *does* make applicable to the states the rule that a coerced confession shall not be used to convict. In *Ashcraft v. Tennessee*, 332 U.S. 143, 154 (footnote 9) the court said:

"The question in the *Bram* case was whether Bram had been compelled or coerced by a police officer to make a self-incriminatory statement, contrary to the Fifth Amendment; and the question herein is whether Ashcraft similarly was coerced to make such a statement, contrary to the Fourteenth Amendment. *Lisbena v. California*, 314 U.S. 219, 236-238. Taking together, the *Bram* and *Lisbena* cases hold that a coerced or compelled confession cannot be used to convict a defendant in any state or federal court."

It must be remembered that this writing was not contraband; it was not the property of the deceased; it belonged to nobody but the author. And it was not an instrumentality of the crime. So, under the ordinary rules governing seizure and use of evidence, it was not proper for the prosecution to make use of it.

"When a man is legally arrested for an offense, whatever is found upon his person, or in his control *which it is unlawful for him to have, and*

*which may be used to prove the offense, may be seized and held as evidence in the prosecution."* *Carroll v. United States*, 267 U.S. 132 (Italics supplied)

"The government cannot justify the seizure of private papers and memoranda on the ground that they were to be used as evidence in a criminal prosecution, *where the papers themselves were not forfeitable*, and hence not subject to seizure." *United States v. Friedburg*, 233 Fed. 313. (Italics supplied)

The case differs from those where the papers seized are contraband, *State v. Royce*, 38 Wash. 111, 80 Pac. 268; or the instrumentality of the crime, *State v. Lindsey*, 192 Wash. 356, 73 P.2d 738. Articles not used in the commission of the crime are not admissible, even though secured by a lawful search. *State v. Robinson*, 24 Wn.2d 909, 167 P.2d 986.

The question here does not merely involve the privilege against self-incrimination, nor is it answered by *Wolf v. Colorado*. It was convenient for the officers that they did not have to administer any outright physical pressure, but the threat of it was there, as the testimony of Jackson shows. What is involved here is stated by Wigmore:

"Where a compulsory disclosure is involved, it may be admissible so far as the privilege against self-crimination is concerned, and yet the question of its propriety as a confession may be raised; while it may be inadmissible on both grounds." Wigmore on Evidence (Rev. Ed.) Vol. 3, p. 249, Sec. 823.

*Adamson v. California*, 332 U.S. 46, does not go

nearly as far as the district judge seemed to feel. For the court there said:

“The due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion. It forbids any other type of coercion that falls within the scope of due process.” (332 U.S. 54)

*Wolf v. Colorado*, 338 U.S. 25, relied upon by the district judge, does not authorize testimonial compulsion. Business records only were involved there. The distinction is made in *Brown v. Mississippi*, 297 U.S. 278: That while a state may, consistent with due process, require an accused to take the stand, it is a different matter if his out-of-court statements are used against him. Such statements may be used only if they are voluntary disclosures.

***C. Although the instrument was composed and written voluntarily, it cannot be deemed a voluntary disclosure when its delivery was compelled.***

A confession, like any other written instrument, should be regarded as taking effect upon delivery. Before that it is like the manuscript of a novel, which the author may destroy. The boy testified that after writing out Ex. “H” in school, he put it in his pocket and forgot about it; he did not show it to anybody else (R. 267). And it is perfectly clear that if he had not been compelled to publish it, he would not have done so.

The definition of confession includes communication. Such is Bouvier’s definition:

“The voluntary admission or declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participa-

tion which he had in the same." (Third Revision, 1914)

Here the officers did not have to apply any force because the confession was all written out. But the threat of it was there; Jackson's conduct was such an intimation that the situation was "inherently coercive."

But even in ancient times the mere writing of a confession in privacy, without substantiation by the defendant's subsequent oral admissions, was not enough to convict. Macaulay tells in his essay on Lord Bacon ("Miscellaneous Works," Harper & Bros., New York) how, when Bacon was attorney-general (about 1614), an aged clergyman named Peacham was accused of treason on account of some passages in a sermon which was found in his study. "The sermon, whether written by him or not, had never been preached. It did not appear that he had any intention of preaching it. The most servile lawyers of those most servile times were forced to admit that there were great difficulties both as to the facts and as to the law." The difficulties were removed by putting the prisoner to the torture (an illegal procedure, even then), and by tampering with the judges. But, although Peacham was finally convicted, the charges were "so obviously futile that the government could not, for very shame, carry the sentence into execution; and Peacham was suffered to languish away the short remainder of his life in prison."

The instrument upon which the boy was convicted was never intended for publication, and it is shame-

ful indeed, for the state of Washington to compel him to produce it, and then imprison him for doing so.

## II.

The written confession upon which the conviction was based was not in fact or in law a confession.

*A. Considering the age of the defendant, his character and personality, and the circumstances under which the confession was written, it should have been rejected as worthless.*

In the trial of Richard Hein the possibility that the written instrument involved here was false, or was written as a prank was not even explored. It was assumed throughout that the confession must be true.

In the original criminal trial the judge presiding had prepared an instruction upon the hypothesis that the confession was false. The instruction was not given, nor was there anything of similar import. In his own words:

“That instruction was to the general effect that it was for the jurors to determine, from all the evidence bearing thereon and in the light of all evidence in the case, whether Exhibit ‘H’ was fact or fiction, truth or falsity. And I assume such was a matter for the determination of the jury, even in the absence of that instruction.

“That instruction was that according as the jury might have determined such to be, they would give the force and effect in the determination of the verdict. If they found it fiction, they might cast it aside of no moment, and proceed to the determination of the guilt or innocence of the accused upon what they might deem other

credible evidence in the cause. Whether the jurors determined that such was fact or fiction, truth or falsity, I suppose we will never know.” (R. 323, 324)

The supreme court treated the writing as a confession, for in their opinion they said, speaking of the defendant, “He was arrested, and a full confession, written on school paper, was found in his possession” (32 Wn.2d 316). They were led into this by the prosecuting attorney’s brief, which says, “\* \* \* what the officers found there at that time is very accurately written out and verified in appellant’s written confession dated September 17, 1947.” In the state’s brief there is no suggestion that there could be any doubt that it was truly a confession (Ex. “J” in Cause No. 48277).

The only evidence touching the writing of the confession came from the boy himself. When in the jail in obedience to the command of the sheriff he laid his things out on the table, he was taken from the room (R. 272, 285). Upon his return the following occurred:

“By MR. SHERIDAN (prosecuting attorney):

Q. That was in your wallet, wasn’t it, Richard (showing him a piece of paper with writing on it)?

A. I don’t know. I wrote it in study hall in school one day.

Q. You wrote this out yourself?

A. Most likely.

Q. Most likely, Richard! I’m not going to argue with you but that’s your writing and address, isn’t it?

A. It probably is.

Q. You wrote it in school on the 17th day of November?

A. Not the seventeenth, I could have dated it back.

Q. But you wrote it?

A. Maybe.

Q. You told us a minute ago you did, why change your story right here. Wouldn't you feel better if you got it out of your system now?

A. I didn't kill him so what the hell have I got to worry about.

Q. Richard, you called Joe a liar a minute ago and now we find this in your wallet and you say you wrote it in school?

A. I didn't tell him a damn thing Monday or Tuesday, either one.

Q. When was it you told him?

A. I told him all I read in the paper. \* \* \*."  
(R. 508)

At his trial the boy testified to exactly the same thing. He refused to identify the particular writing, doubtless because it had been out of his possession from November to April (R. 289), but he had no hesitancy in saying that he wrote something like it on Wednesday. (The crime was discovered Tuesday.) He repeated what he said in the sheriff's office that it had no foundation in fact (R. 265). The matters contained in the note he learned in the neighborhood the evening before (R. 259). After he wrote the note he put it in his pocket (R. 264) and forgot all about it (R. 267). Referring to his refusal to identify the writing when he was brought back into the room at

the jail, he said his refusal was based on the fact that he "couldn't recall right away" (R. 272).

He explained why the note bore date November 17th (R. 276); it was merely part of the fiction. On cross-examination he went over the ground again without faltering (R. 284).

In the state habeas corpus proceeding the trial judge said nothing about the inherent credibility of the writing. He said *anything* seized as a result of a lawful arrest could be admitted in evidence (R. 492). The supreme court in the appeal in that case treated the question as though only involving the privilege against self-incrimination (35 Wn.2d 688, 215 P.2d 403).

The district judge held that the writing was properly submitted to the jury and all questions involving it were foreclosed by the verdict; that whether or not it was a confession was immaterial, as in any event it was competent as circumstantial evidence (R. 514).

The writing in question should not have been regarded seriously by the law enforcement officers. Wild and improbable statements from fourteen-year old boys are not uncommon, and experienced officers know almost instantly from their hyperbolic character that they are pure invention. But even though they chose to take it seriously the court should have rejected it. For one thing is certainly required in the case of a confession, and that is that the confessionalist be of serious intent.

"To render confessions of guilt credible, it is



essential that they should have been made with a *sincere intention of telling the truth.*" Wharton, Crim. Ev., 11th ed., p. 956, Sec. 580.

"Consequently such written statement, *when prepared deliberately and solemnly*, is admissible in evidence against the defendant who made it, but it is of weight proportioned to its solemnity and pertinency." *Id.*, Sec. 582 (Emphasis added)

The boy at the outset, at the very moment the confession was discovered on his person, said it was not true; he immediately said he did not kill the man (R. 508). This was said directly to the prosecuting attorney. He next said, in his affidavit filed with the motion to suppress that he had not confessed to the murder (R. 569). Upon his trial he was asked by his counsel why he wrote it; his answer was, "Just for foolishness" (R. 264). He was asked if there was any basis in fact for what was written, and answered, "No, it isn't the truth" (R. 265). He was cross-examined but no attempt was made to show that it was anything but what he described it, "foolishness" (R. 285).

The boy was not a witness in the state habeas corpus hearing and was not present (R. 362). After the decision of the supreme court affirming the order of the superior court dismissing the petition, the prisoner submitted to two tests at the request of the "Seattle Times" (R. 69, 81). One of these was a "truth-serum" test, conducted by a physician who is a specialist in anesthetics. This physician practices in the town where the penitentiary is located (R.

48), and he administered the test there (R. 51), on September 10, 1950 (R. 102). Under the influence of this powerful drug, which inhibits the ability to rationalize (R. 49), the boy gave answers showing plainly that he knows nothing about the murder (R. 102-121).

Another test was the Keeler Polygraph, or "lie detector," which was administered by a factory technician (R. 65, 74). The technician was of opinion that the boy was not guilty of the murder (R. 75, 121).

Because a confession is so weighty as proof we must demand the most satisfactory testimony before accepting that, which if believed, will render other evidence superfluous. Wigmore on Evidence (Revised Ed.) Vol. 3, Sec. 866, p. 358.

From before the time of the Amelikite who went into the camp of David and falsely said he had slain Saul, 2 Sam. 1, to the present day, false confessions have been known to the law. Wigmore, "The Science of Judicial Proof" (3rd ed.) Sec. 275, p. 621; Hans Gross, "Criminal Psychology" (Trans. Kallen, 1911) Sec. 8, p. 31; Bentham, "The Rationale of Judicial Evidence," Vol. 3, p. 117, *et seq.*; Wigmore on Evidence (Revised Ed.) Sec. 867, p. 359; Best "The Principles of the Law and Evidence" (Third American Ed. by Charles Chamberlayne, Esq., 1908) Vol. 3, p. 509.

Under the truth-serum test the boy himself gave us the clue to his action in writing this note. "I was a big egotistical lad," he said when under the influence of the drug (R. 111). This is about as good an

explanation as any, for we do not feel competent to examine the main-springs of adolescent conduct. But legal scholars have studied the subject. Best, whose great work is above referred to, based his studies on Bentham, the "father of judicial evidence." In his work he says:

"The fallacy also of attributing a conclusive effect to confessorial evidence was detected by the intelligence of later times, \* \* \* and has been abundantly confirmed by experience. Why must a confession of guilt necessarily be true? Because, it is argued, a person can have no object in making a false confessorial statement, the effect of which will be to interfere with his interest by subjecting him to disgrace and punishment; and consequently the first law of nature — self-preservation — may be trusted as a sufficient guarantee for the truth of any such statement. This reasoning, however, is more plausible than sound. Conceding that every man will act as he deems best for his own interest, still (besides the possibility of his misconceiving facts or law), he may not only be most completely mistaken as to what constitutes his true interest, but it is an obvious corollary from the proposition itself, that when the human mind is solicited by conflicting interests the weaker will give place to the stronger and consequently, that a false confessorial statement may be expected when the party sees a motive sufficient, in his judgment, to outweigh the inconveniences which will accrue to him from making it. Now, while the punishment announced by law against offenses is visible to all mankind, not only are the motives which induce a person to avow delinquency confined to his own breast, but those who hear the confes-

social statement often know little or nothing of the confessionalist. \* \* \*

“‘Vanity,’ observes the jurist above quoted (3 Bentham, *Judicial Evidence*, 117, 118), without the aid of any other motive, has been known (the force of the moral sanction being in these cases divided against itself) to afford an interest strong enough to engage a man to sink himself in the good opinion of one part of mankind, under the notion of raising himself in that of another \* \* \*.’ False statements of this kind are sometimes the offspring of a morbid love of notoriety at any price. The motive that induced the adventurous youth to burn the temple of Ephesus would surely have been strong enough to induce him to declare himself, however innocent, the author of the mischief, had it occurred accidentally \* \* \*. And whether from such morbid love of notoriety, or mere weak-mindedness, or a love of mischief, it is almost invariably the case of murders of a specially horrible kind,—as, for instance, the Whitechapel murders of prostitutes in 1888 and 1889—are followed by a series of false confessions \* \* \*.”

Consider the situation of a 14-year old boy coming home and finding his neighbor brutally slain. Is it remarkable that the thing preyed on his mind? That he let his mind dwell on the manner of the killing? And then, in fancy, that he composed an account of it, with himself as the principal figure?

“A dramatic, bold crime may captivate imagination and cause admiration and may lead someone to confess falsely for being looked upon by others as the author of the crime.” P. C. Bose, “Introduction to Juristic Psychology,” (Calcutta, 1917) p. 361.

**B. *The question of whether, considering the foregoing, the instrument was a confession, was for the court, and the verdict of the jury did not foreclose it.***

The question whether a confession may form the basis of a conviction is always one of law for the court. Wigmore on Evidence (Revised Ed.) Sec. 861. As the author explains, the reason is that our confession rules are somewhat artificial and the jury is not familiar enough with them to employ them.

Only where there is a question of fact as to whether a confession was given under force or inducement is the question for the jury. *State v. Van Brunt*, 22 Wn. 2d 103, 154 P.2d 606. The facts concerning this confession were freely admitted, so there was nothing for the jury to pass upon. But the confession being given to them in the manner which it was—without any instruction (R. 323)—how could the jury do other than take it very seriously? With that before them they almost had to convict.

Wigmore, after discussing the history of confessions in the law and the theories under which they are admitted and rejected, sums up his own ideas by the statement that all *well-proved* confessions should be admitted. Wigmore on Evidence (Revised Ed.) Sec. 866, 867. Whether they are “well proved” is naturally for the court. In this case the confession was not well proved; it was not proved at all (by which is meant its intrinsic worth was not established). And in holding that the question was foreclosed by the verdict (R. 514), we submit the district judge erred.

As has been already pointed out, no court has determined that the confession in the case at bar was voluntary. This is almost exactly like the situation

in *Ashcraft v. Tennessee*, 322 U.S. 143, where, after carefully reviewing the state-court proceedings, it was said:

“If the question of the voluntariness of the two confessions was actually decided at all it was by the jury.” (page 146)

After reaching this conclusion, the court said further:

“This treatment of the confessions by the two State courts, the manner of the confessions’ submission to the jury, and the emphasis upon the great weight to be given confessions make all the more important the kind of ‘independent examinations’ of petitioner’s claims which, in any event, we are bound to make \* \* \*. Our duty to make that examination could not have been ‘foreclosed by the finding of a court, or the verdict of a jury, or both’.” (pp. 147, 148)

The district judge did not follow the Supreme Court’s pronouncements. He felt bound by the verdict of the jury, both as to voluntariness of the confession and as to its weight. He said:

“Petitioner contends that the writing was not a confession since it was written in privacy, not directed or communicated to any other person and was wholly an untrue, fabricated statement, written out as the result of a childish whim or prank. It was the theory of the defense that the writing was purely fictional but the jury, as the arbiter of the facts was not obliged to adopt that theory. The date the writing bore and its contents, considered with other evidence in the case, were capable of supporting an inference that prior to the discovery of the body of the murdered man, the defendant Hein had detailed

knowledge of the manner in which the murder was committed. Whether or not the writing may strictly be regarded as a confession, it was material and it did have probative value. The weight to be given it was for the jury to determine.” (R. 514)

Like every other fact in a criminal trial, the fact of confession must be proved. Wigmore, Sec. 860, 861. Considering the facts established at the criminal trial, can it be said that this confession was proved? Can it be said there is an inference that the boy confessed, arising merely from the writing of the note? We submit there is no such inference, and that no confession was proved.

Again we refer to the works of a great legal scholar, this time the German to whom Wigmore dedicated his work, “The Science of Judicial Proof.” The writer is Hans Gross and the work is “Criminal Psychology.” On page 31 *et seq.*, we read:

“The making of a confession, according to laymen, ends the matter, but really, the judge’s work begins with it. \* \* \* Confession is a means of proof, and not proof. \* \* \* The existence of a confession contains powerful suggestive influences for judge, witness, expert, for all concerned in the case. \* \* \* Concerning himself, the judge must continually remember that his business is not to fit all testimony to the already furnished confession, allowing the evidence to serve as mere decoration to the latter, but that it is his business to establish his proof by means of other evidence, *independently*. The legislators of contemporary civilization have started with the proper presupposition—that also false confessions are made,

\* \* \* (and) can be discovered as false only by showing their contradiction with the other evidence. If, however, the judge only fits the evidence, he abandons this means of getting the truth. \* \* \*”

The record in the criminal case shows that the boy could not have committed this crime. The body of the victim was discovered Tuesday (R. 127). The boy was in school all that day and the day before that, Monday (R. 239). His whereabouts were thus accounted for from 8:40 A.M. to 3:15 P.M. those days. His whereabouts on Saturday were shown by his father (R. 213). His mother, petitioner here, was working during the day but she accounted for him that evening (R. 230), as did the father (R. 216).

On Sunday the boy piled wood for a neighbor until noon (R. 217, 231). In the afternoon he was with some other boys (R. 780-788, 917). His mother (R. 233) and father (R. 217) corroborated this. He stayed home Sunday evening (R. 218, 234). Monday morning he went to school (R. 219, 235) and, as previously noted, the school records show that he was present all day.

When he got out of school Monday night he met his father and mother (R. 235). That night his mother went to P. T. A. meeting (R. 235) and he stayed home with his father and ten-year-old brother (R. 220).

No attempt was made to contradict any of this. The witnesses to the boy's alibi were not impeached, and if any doubt is to be cast upon the testimony of appellant and her husband there should be some sug-



gestion in the record as to why they were not to be believed. *United States v. Lee Heun*, 118 Fed. 442. The readiness of the parents to permit a search of the home shows they had nothing to conceal.

The rule in Washington is that only where there is an issue of fact involving the making of a confession is its admissibility for the jury. Where the facts are admitted it is a question of law for the court. *State v. Van Brunt*, 22 Wn.2d 103, 154 P.2d 606. In the case at bar the defendant told why and under what circumstances he wrote the note. It was for the court, then, under the admitted circumstances to determine whether the instrument was to be treated as a confession.

The Washington statute on the admissibility of confessions reads as follows:

“Confession as Evidence. The confession of a defendant made under inducement, with all the circumstances, may be given in evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony.”  
Rem. Rev. Stat., Sec. 2151.

Under the statute, it is held that the question of duress is for the court; if he finds the confession was made under the influence of fear produced by threats he is to reject it. *State v. Barker*, 56 Wash. 510, 106 Pac. 133; *State v. Washing*, 36 Wash. 490, 78 Pac. 1019.

But even if the confession involved a jury question, are they to be left entirely without guidance? Without being given the option to reject it if they find it false?

The Washington constitution requires the judges to declare the law. Art. IV, Sec. 16. And the concept of a fair trial includes instructions upon every element of the case. There should be instructions on all essential questions of law involved in the case, whether requested or not. *Kreiner v. United States* (2 Cir.) 11 F.2d 722, 731, cert. den. 271 U.S. 688; *Kincaid v. United States* (D.C.) 96 F.2d 522; *Kenion v. Gill* (D. C.) 155 F.2d 176; *People v. O'Dell*, 230 N.Y. 481, 130 N.E. 619; *Com. v. Ferko*, 269 Pa. 39, 112 Atl. 38; *Pearson v. State*, 143 Tenn. 385, 226 S.W. 538; *Dur-off v. Comm.*, 192 Ky. 31, 232 S.W. 47; *State v. Lackey*, 230 Mo. 707, 132 S.W. 602.

***C. The question of the voluntariness and trustworthiness of the confession cannot be disposed of by allowing it to go to the jury as circumstantial evidence.***

The district judge said in his letter to counsel:

“Whether or not the writing may strictly be regarded as a confession, it was material and it did have probative value.” (R. 514)

This was the view taken by the state court judges, and amounts simply to the assertion that the writing was admissible as circumstantial evidence. The judge presiding at the criminal trial said it had “evidentiary value” (R. 323). It was also the view of the judge in the state habeas corpus hearing (R. 492, 493).

Confessions are not circumstantial evidence; they are direct evidence of the highest character, for the defendant on trial testifies directly against himself

Because they are so weighty as proof, it is necessary to discriminate carefully between the acceptance of the confession as a proved fact, and whether the fact of confession has been proved. Wigmore, Vol. 3, p. 357, Sec. 866. If it has not been proved to be a confession the jury is not entitled to consider it.

Confessions are not circumstantial evidence as that term is used in statutes prohibiting the death penalty where the conviction is based upon circumstantial evidence. Nichols, *Applied Evidence*, Vol. 2, p. 1069; *Mitchell v. People*, 76 Colo. 346, 232 Pac. 685, 40 A. L.R. 566.

The boy testified that he wrote this note in school on Wednesday (R. 264). When first confronted with it he said he could have dated it back (R. 508). At his trial he testified that he dated it back because the newspaper account that came out first said the deceased had been dead from 18 to 24 hours, so he dated it back to Monday, the 17th (R. 276). The record shows that he read the Seattle paper on Wednesday (R. 293); and the account, dated Tuesday, did say that the victim had been dead from 18 to 24 hours:

“Everett, Nov. 18 (AP)—Brutally bludgeoned about the face and with his throat cut, the body of James Moore, 85, was found today in the front room of his large, three-story house in Hartford by a neighbor, Snohomish County Coroner, Kenneth Baker reported. *He had been dead 18 to 24 hours. \* \* \**” (Excerpt from Seattle “Post-Intelligencer,” of Wednesday, November 18, 1947, quoted in Appellant’s Brief in *Hein v. Smith*, Washington Supreme Court, No. 31139)

Against this we have nothing—except suspicion.

There was not even a circumstance indicating that the defendant, overburdened with the sense of guilt, found that he must give expression to it, and wrote the confession. If such an overpowering desire to share his guilty secret existed, would it not have manifested itself at some time, particularly when, upon his arrest, he was charged with this murder? When we consider that he, an immature boy, should have convinced experienced law enforcement officers of his innocence—note that Webb Sloane, with 14 years on the Washington State Patrol (R. 63), directed questions to him (R. 119 *et seq.*) and testified that he was satisfied with his answers while under the truth-serum (R. 64)—has withstood confinement since November 18, 1947 (R. 38); has asked for a new trial (See Cause No. 31175, Washington Supreme Court), when he knew that the next jury could hang him; has at all times maintained his innocence;—when we contemplate these and other matters in the record here, can we say that he is harboring a guilty secret? No, such a secret would have devoured him before this. Cf. Daniel Webster in *Com. v. Knapp*, VII American State Trials 395.

Parenthetically, it may be noted that the defendant did not waive his immunity under the Washington constitution against compulsory self-incrimination by taking the stand. He had been placed under the imputation of guilt and his explanation of the confession was not a waiver. *State v. O'Hara*, 17 Wash. 525, 50 Pac. 477; *State v. Jackson*, 83 Wash. 514, 145 Pac. 470.

If a confession—inadmissible because it is not voluntary or trustworthy—could be admitted, not as a confession, not as proof of the facts therein contained, but simply as another circumstance to be considered along with the other evidence tending to establish guilt, then the result of the confession cases in the Supreme Court would have been quite different. For it must be conceded that the fact that a man is willing to confess, even under pressure, is some evidence of guilt, particularly to the lay mind. And if the prisoner's arm is twisted only a little, is that not evidence that the admission was ready to his lips? Should not the jury be allowed to consider that an innocent man would have held out longer?

These speculations have no place in a system that conforms to "civilized standards." *Chambers v. Florida*, 309 U.S. 227. The Supreme Court has in several cases been asked to consider that but little force was used; they have always refused to measure the coercion. In *Malinski v. New York*, 324 U.S. 401, the defendant was not tortured; he was humiliated, was made to sit in a corner naked; "psychology" was used upon him; but there was hardly enough to break the will of a strong man. And there was substantial, independent evidence of guilt. The court held the admission of the confession fatally tainted the verdict, and directed a reversal. So in the case at bar, the instrument should not have been permitted to have any part in the jury's deliberations, neither as a confession, for it was not that, nor as circumstantial evidence.

**D. There was no corroboration of the confession.**

It is impossible to find any corroboration of the confession in the record. The defendant's accounts of his activities is not disputed, and nothing before or after the discovery of the crime lends color to the theory that he had knowledge different from anybody else. All the facts stated in the writing were known to the public the day the body was discovered. Mere curiosity seekers had entered the house when the body was found (R. 899).

The possession of money is a circumstance, but it stands alone. In cases where the possession of money figures in a conviction it will always be found to be associated with other strong circumstances pointing to guilt.

The possession of the money was explained (R. 246, 250, 268, 278, 287). In the truth-serum test the boy was asked about it again (R.. 105, 108, 119). It is true Oscar Magnuson denied giving him the money (R. 295), but he had good reasons for doing so.

Robbery was relied upon to furnish motive, and it was sought to show that the accused had seen the deceased with money the day he was last seen alive (R. 837). But the witness later explained that the defendant was in another part of the store, back of a partition telephoning, and could not have seen the deceased (R. 1191).

Corroboration should, of course, go to the crime, not the confession. For the latter is admitted; what is needed is evidence to identify the slayer as well as the slain. *State v. Gregory*, 25 Wn.2d 773, 171 P.2d

1021. In Washington there must be some *independent* evidence identifying the defendant as the killer.

“No person shall be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of the killing by the defendant, as alleged, are each established as independent facts beyond a reasonable doubt.” Rem. Rev. Stat. Sec. 2391.

And a conviction in Washington cannot be based upon an uncorroborated confession alone. *State v. Marselle*, 43 Wash. 273, 86 Pac. 586; *State v. Bestolas*, 155 Wash. 212, 283 Pac. 687.

The true test of a confession is whether it is trustworthy. *State v. Susan*, 152 Wash. 365, 273 Pac. 149; *United States v. Klee*, 50 F.Supp. 679 (D.C. Wash., per Schwollenbach, J.); *People v. Valletutti*, 78 N.E.2d 485 (N.Y.); Wigmore on Evidence (Rev. Ed.) Vol. 3, p. 246, Sec. 822. If this document were a trustworthy confession it would find some corroboration in the evidence. There is none.

***E. Perjured evidence was knowingly used in an attempt to corroborate the confession.***

After Joe Jensen told his story to the sheriff's deputies and prosecuting attorney, he was allowed to go his way. We have already seen how doubtful this story was, since he told the prosecutor that he could be mistaken about the day of the conversation (R. 508). No effort was made to determine exactly when the conversation occurred (R. 467-469). Jensen was allowed to go his way; no subpoena was served upon him; he was not told that he must hold himself in readiness to testify (R. 381-382). He went to California.

He was visiting an uncle in Chico when he got a telegram from his father that he was wanted as a witness (R. 382). He did not get the chance to come back voluntarily because he was arrested immediately and lodged in jail. The deputy, Weaver, came down and returned him to Everett under guard. There he was thrown in jail and held until the trial was over (R. 387, 1384).

While he was in jail he was given a statement and was told he had to testify according to that (R. 390). The testimony he gave was false because he left the impression that the conversation between Richard and himself occurred before the discovery of the crime; whereas, in truth, it occurred on Thursday, two days after such discovery (R. 448).

The judge in the state habeas corpus proceeding chose to disbelieve Jensen's testimony at that hearing, and the supreme court and now the district judge agrees with him.

There was no motive for perjury at the second hearing. The witness was under no pressure. He understood the risk he was running of being charged with perjury when he changed his testimony (R. 422). He said he wanted to do what was right (R. 442), and that was the only motive for taking the stand in that case.

Jensen was weak and indefinite. It is apparent that he wanted to please the officers (R. 184). And it is very clear that they knew he was stretching the truth considerably in giving his testimony. The testimony given in the state habeas corpus hearing confirms this.



But even without the subsequent recantation there would be sufficient circumstantial evidence of the knowing use of perjury.

“In a case of this nature one would not expect to find direct proof of the connivance of the prosecution in the use of perjured testimony, and the circumstantial evidence is as strong as could reasonably be expected.” *United States v. Ragen*, 86 F.Supp. 382, 390.

### III.

**The complaint here is not for mere errors but of a wrong so fundamental as to render the proceedings void as contrary to due process of law.**

After a trial in a state court the petitioner may have a hearing in a court of the United States into the very substance of the proceedings leading to his conviction, if it appears that rights secured by the Constitution have been violated. This may involve a consideration of the evidence for, as Mr. Chief Justice Hughes observed:

“The freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal.” *Brown v. Mississippi*, 297 U.S. 278.

So the position taken by the state, that this is just another piece of evidence, and the sufficiency of the evidence to sustain a conviction cannot be inquired into upon a habeas corpus, is not sound. For the admission of incompetent evidence may involve a vio-

lation of due process. It has been held that a conviction based upon hearsay alone renders a conviction void. *McRea v. State*, 8 Okl. Crim. 483, 129 Pac. 71; *Smith v. State*, 59 Okl. Crim. 312, 58 P.2d 347; *Young v. State*, 208 P.2d 1141.

Some years ago the editors of the Lawyers Edition of the Supreme Court reports gave their views in this language:

“Although no case has been found in which an irregularity connected with matters of evidence or witnesses has been considered grave enough to justify the issuance of habeas corpus, it cannot be said that such an irregularity will under no circumstances be a sufficient basis for a habeas corpus. Where the irregularity committed constitutes such a drastic violation of the constitutional rights of the prisoner as to deprive him of the fundamentals of a fair trial, the United States Supreme Court may feel moved to grant the writ, since the Supreme Court has always felt it to be its privilege ‘to look beyond forms, and inquire into the very substance of the matter.’ *Frank v. Mangum*, 237 U.S. 309, 331, 59 L. ed. 969, 981, 982, 35 S. Ct. 582.” Note to *Pyle v. Kansas*, 87 L. Ed. 220.

The principle expressed by Mr. Chief Justice Hughes in *Brown v. Mississippi*, 297 U.S. 278, is certainly applicable here:

“That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void.” (p. 286)

It has been argued that the failure to urge some of

the matters argued herein is fatal to petitioner's case here. But where constitutional rights are involved an entire failure to pursue appellate remedies would not bar a federal court from granting relief in a proper case.

"Heretofore we have not considered a failure to appeal an adequate defense to habeas corpus in this type of case. *Smith v. O'Grady*, 312 U.S. 329." *Williams v. Kaiser*, 323 U.S. 471.

The district judge recognized the principle involved here, for he said:

"In considering the petition and the evidence here, I have had in mind the principle applied in the leading case of *Powell v. Alabama*, 287 U.S. 45, and followed by the Supreme Court in many later cases, namely, that even though the first eight amendments do not apply directly to the states, nevertheless, if in the overall setting of a state court trial the denial of a right guaranteed by such amendments had the effect of depriving the accused of a fundamentally fair trial, then the accused has not been accorded the due process required of the states by the Fourteenth Amendment. In other words, a state court conviction may be successfully attacked by petition for habeas corpus if the trial is tainted with error so serious as to constitute 'a denial of fundamental fairness, shocking to the universal sense of justice. \* \* \*.' *Betts v. Brady*, 316 U.S. 455, 462."

In applying the principle, however, he ignored too many things. He seems to assume there is some tangible, real evidence to convict. There is none. Reading the record, one can see there was no real effort to

get at the facts, that the investigation was superficial. Thus, the sheriff's office made no investigation after the note was discovered (R. 1386), and the prosecutor made none either (R. 1262). The testimony of the child-witnesses was relied upon entirely to substantiate the confession. Instead of complying with conduct required of the states and laid down by the Court in *Watts v. Indiana*, 338 U.S. 49, that it "must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation,"

the state contrived a conviction by turning an innocent and random scrawl into a solemn confession of guilt.

Can it be said that the testimony of the deputy sheriff, Walker, was compatible with fundamental fairness? That it was fair for the prosecutor to use his own secretary to get his bias against the prisoner across to the jury? For him to ask John Hein whether he was not expecting his son (for son in fact he was) sometime to be charged with murder? And was it fair for him to represent to the supreme court in his brief that no reasonable doubt existed that the boy had guilty knowledge, when in fact there was very troubling doubt on this score?

Perhaps there should be no difference in the trial of a hardened criminal and a little boy. But the Supreme Court has noted a difference. *Haley v. Ohio*, 332 U.S. 596; *Uveges v. Pennsylvania*, 335 U.S. 437; *Wade v. Mayo*, 324 U.S. 672.

***A. The admission of testimony of a police officer as to answers by the accused to questions put by the officer which tend to prove guilt violates rights secured by the Fourteenth Amendment.***

In the *Bram v. United States*, 168 U.S. 532 case, the Court gave the reasons for not permitting testimony of police officers of the statements of the accused under questioning while in their custody. Aside from the historical reasons, which are in themselves weighty, the temptations toward abuse are too great. They said:

“While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which questions put to him may assume an inquisitorial character, the temptation to press him unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, \* \* \* made the system so odious as to give rise to a demand for its total abolition \* \* \*.” (168 U.S. 532)

And when a police officer is permitted to give testimony of statements made by an accused from which guilt may be inferred, the abuses are carried into the courtroom, and the accused finds himself powerless to meet them. Consider the testimony of Walker, the deputy sheriff, who knew nothing of the investigation when he came on duty the night the boy was arrested. Surprised to find a child in his custody, he asked him what he was there for.

"A. I asked him what he was doing in the tank.

Q. What did he say?

A. He said he was — —

MR. DAILEY (Interposing): Now, just a moment, Your Honor, this is something that seems to me is too remote to have anything to do with the issues here.

THE COURT: Well, I think some more specific question might be asked here, sir.

Q. Did you make inquiry of him at that time as to why he was there?

A. I did. I asked him what he was doing up there.

Q. Did you ask him why he was in jail?

A. I did.

Q. What did he say?

MR. DAILEY: I object to that, if Your Honor please. I think it is too remote.

THE COURT: It will be overruled.

MR. DAILEY: Except.

A. He said he was in for murder.

\* \* \* \* \*

A. I asked him if he murdered this man.

Q. What was his response to that?

A. The answer was—he kind of shook his head, and said, what sounded to me like 'uh-huh,,' 'but,' he said, 'they'll have to prove it on me.'

(R. 772, 773)

(The matter of unfounded inferences drawn from words supposed to be confessorial is discussed in Best, "Principles of the Law and Evidence," *op. cit.*, p. 522-523.)

Compare the foregoing quotation with the *Bram* case. Following is what the officer was permitted to testify to in the *Bram* case, and which the Supreme Court held violated his rights under the 5th Amendment: The detective told the accused, while he held him prisoner, that another member of the crew saw him do the murder. The accused answered, "He could not have seen me; where was he?" When he was told the witness was at the wheel, he said, "He could not have seen me from there" (168 U.S. 538). These statements were offered in the government's case in chief. Apparently to avoid the rule requiring a showing that confessions, to be admissible, must be voluntary, the government contended they were not confessions because they were denials. But the court said:

"It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, as this is the only conceivable hypothesis upon which it could legally be admitted to jury." (168 U.S. 541)

***B. Testimony by the prosecutor's paid employee that denials of guilt by a boy in custody for murder seemed to her not emphatic and left her with a feeling of doubt as to whether he was telling the truth is in violation of the right of the accused to a fair trial.***

Phylli Mootz, the prosecutor's secretary, who had worked for former prosecutors (R. 803), testified to events at the jail interview. When counsel for the defendant asked her to admit that the boy denied committing the murder (a witness for the state had testified that he denied it, R. 167), the temptation to

color the facts against the boy was too great to resist. Some of the questions and answers follow:

"Q. During all of that time Richard denied that he had anything to do with Mr. Moore, didn't he?

A. What do you mean—with him?

Q. With this killing.

A. Yes, he denied it at first; but he admitted writing this statement.

Q. He admitted writing that statement? Now, I didn't ask you anything about that. He denied throughout their conversation, and throughout all of the questioning they gave him there, that he killed Mr. Moore?

A. Yes, but he wasn't emphatic about it.

Q. He wasn't emphatic about it? What do you mean, he wasn't emphatic?

A. He just said, 'I didn't do it.'

Q. That's all he said. He just said, 'I didn't do it,' is that right?

A. Yes. He kept denying it.

Q. He kept denying it, and denied it constantly, isn't that right?

A. Well, he wasn't asked constantly. He just was asked to state what had happened.

Q. Well, of course, he was asked a good many questions there, wasn't he?

A. That's right.

Q. And it covered a good many pages when you transcribed it, didn't it?

A. Yes.

Q. So he was asked over and over again, wasn't he, Miss Mootz?

A. Yes.



Q. And he denied it each time?

A. Yes.

Q. Now, what do you mean when you say 'he didn't deny it emphatically'? You mean he didn't swear, or rave, about it, or what?

A. That's right.

Q. You mean he sat there quietly and denied it? Is that what you mean?

A. Yes.

Q. He didn't rant and rave about it?

A. That's right.

Q. Would he have to rant and rave around about it to convince you that he was emphatic in his denial.

A. No.

MR. SHERIDAN: Object as being argumentative.

THE COURT: It is.

Q. He was as emphatic in his answers as you have been here, wasn't he?

A. Well, there's sort of hesitation.

Q. Sort of hesitation?

A. Yes.

Q. And that sort of hesitation would come where? When did he sort of hesitate?

A. Well, I would say he just wasn't definite.

Q. What?

A. He just wasn't definite enough in his answers.

Q. He was definite enough in his denial that he had anything to do with it, wasn't he?

A. Yes.

Q. You think he was not definite enough in some other questions that were asked?

A. Well, just the way he answered would leave a doubt in my mind, and it might in some other person's mind, whether he was telling the truth or not.

Q. And you had some doubt?

A. That's right.

Q. And now you have some prejudice, then, in this case, don't you?

A. I'm not prejudiced. I just have doubt." (R. 196-199)

Now it may be argued that this occurred on cross-examination; that counsel did not need to press the witness, and that if he had not done so he would not have elicited this testimony. But what was she there for? She was a state witness, and in addition she was the prosecutor's paid employee. Her job was to influence the jury into a verdict of guilty. The prosecutor could not, himself, express an opinion of guilt, but by putting his secretary on the stand to identify the confession he accomplished much more: he got his own bias against the prisoner across to the jury.

***C. It is unfair to insinuate before the jury that the boy must be guilty by asking his father on cross-examination if he did not expect some time to find the boy charged with murder.***

This boy was large for his age, fourteen (R. 1254), and this fact was played upon. In his opening statement the prosecutor referred to the size of the boy and told the jury he had endeavored to escape (R. 137). The evidence on this was the other way; the matron in the juvenile detention home testified the boy's conduct was good (R. 822).

But something had to be done to make a killer out of him, so on the examination of Mr. Hein, who was so close to the boy that he hated to admit that he was his stepfather (R. 854, 874), the following questions were asked:

“Q. Then were you present when the sheriff and Miss Mootz and myself informed you of his detention in the Snohomish County Jail?

A. I was.

Q. Do you know what you responded to that? Do you know what your response was to that?

A. I said, ‘That’s impossible.’

Q. Can you recall whether or not you said, ‘I figured this would come’?

A. No, I never said that.

Q. You never said that?

A. No sir. I did not.

\* \* \* \* \*

Q. Are you Richard’s father or stepfather?

A. I’m not answering that question.

THE COURT: Yes, you are—and forthwith.

MR. DAILEY: Answer the question.

THE COURT: You are a witness now.

A. I am his stepfather.

Q. Don’t you recall at that time, Mr. Hein, asking me, if I had to file charges, if I would file them under another name?

\* \* \* \* \*

A. No, I don’t remember that.

\* \* \*.” (R. 873-875)

The object of this questioning was to prejudice the defendant before the jury. The inference which the jury was expected to draw—and which they did draw

—was that the parent expected the boy to get into serious trouble; the parent was ashamed of his conduct, and did not want his name connected with his own. This is not the conduct of a “minister of justice.” *People v. Klor*, 84 Cal. App. 308, 190 P.2d 643. See also *O’Neill v. State*, 189 Wis. 259, 207 N.W. 280.

#### IV.

**The district court had jurisdiction to hear this case, and this appeal is properly presented.**

It is fundamental that rights secured by the Constitution may be vindicated in the federal courts. The only condition is that remedies in the state court first be exhausted, for these courts are under an equal duty to enforce the supreme law. But by exhausting his state remedies a petitioner does not foreclose himself of a hearing in the federal court. If this were so, the compliance with a requirement of Congress, precedent to an application for relief, would bar the applicant from the very relief claimed.

Such is not the rule; but, of course, the court may take into account the prior hearings, and the consideration given to the constitutional claim. The state court here has heard the petitioner and has refused to grant her relief, but neither the state court nor the court below gave consideration to the principal points in issue, which are the compulsory production of the confession, and its intrinsic worth as proof of crime.

In *Frank v. Mangum*, 237 U.S. 309, 331, it was said:

“\* \* \* a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction

may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state to proceed against him."

In order to pursue the remedy of habeas corpus in the federal courts it is necessary to exhaust all state remedies, including application for certiorari to the Supreme Court. *Darr v. Burford*, 339 U.S. 200. But it has never been held, and it cannot in the nature of things be the law, that by the very act of exhausting his remedies, the petitioner is bound, with respect to his claimed constitutional right, by the determination of the state court.

There was never any specific finding by the state court that the confession was voluntary. Of course, such finding would not foreclose inquiry by this court. *Lisbena v. California*, 314 U.S. 219; *Lyons v. Ikla-homa*, 322 U.S. 596. But the only finding is that the defendant was under arrest when the confession was taken from him, and the voluntariness of the disclosure was not even considered. Nor was the trustworthiness of the writing ever discussed.

A case in the Sixth Circuit, *McCrea v. Jackson*, 148 F.2d 193, is somewhat similar to this. There, after denial of certiorari by the Supreme Court, a petition for habeas corpus was filed in the district court. That court denied the writ upon these grounds: (1) It would be presumptuous to grant the writ after the Supreme Court had ruled; (2) "practically" all

the questions involved had been passed upon by the state supreme court; and (3) it was not one of those "exceptional cases of peculiar urgency" within the rule of *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, which the district court thought it necessary to find. These reasons were held by the circuit court to be insufficient to deny the writ.

The statement as to "those rare cases where exceptional circumstances of peculiar urgency are shown to exist" in the *Kennedy* case was made in a case where the petitioner had not exhausted his state remedies; and was held inapplicable to a case "in which the petitioner had exhausted his state remedies, and in which he makes a substantial showing of the denial of a federal right." *Ex parte Hawk*, 321 U.S. 114, 117.

Of course, the district court had the right to take prior petitions into account in determining whether to entertain petitioner's claims. *Salinger v. Loisel*, 265 U.S. 224. But a liberal view is enjoined upon the court. Even though it might be thought that an abuse was being practiced, the court is required to take a thoughtful and careful view of the petition, lest liberty be lost through deference to rule. *Price v. Johnston*, 334 U.S. 266.

This court has laid down the rule for the district courts. *Forthoffer v. Swope*, 103 F.2d 707. There, following the rule of *Johnson v. Zerbst*, 304 U.S. 458, it was expressed in the syllabus as follows:

"A judge to whom a petition for habeas corpus is addressed should be alert to examine the facts

for himself when, if true as alleged, they make the trial absolutely void.”

The decision of the district judge pays great respect to the determinations of the state court judges (R. 516). This respect is not misplaced; the error lies in making the same assumption they made—that one who confesses must necessarily be guilty. Further, that property taken from one on arrest is per se admissible—even if it is a confession. Starting with these, the result of a trial is a foregone conclusion. And so is the outcome of a habeas corpus case.

***A. The state court did not determine petitioner's important constitutional questions.***

The superior court had before it a petition alleging that upon his arrest the defendant was searched and a writing was taken from him; that this writing was his own property, peculiarly personal, and was not intended for the eyes of other persons; that it was seized during an exploratory search; and that prior to the trial he had made demand for its return.

The state court considered these allegations as bearing upon the lawfulness of the search; and assumed that if the search was lawful anything found could be used to convict, whether otherwise admissible or not. They thus evaded one of the real constitutional questions, which is, can a *confession* taken by force, be used? It cannot, and in the federal courts it would be ordered returned even before indictment. *In re Fried* (2 Cir.) 161 F.(2d) 453.

The trial judge in the state habeas corpus proceeding held that no constitutional right of the accused

was violated during the search, and that the confession thus seized could be used in evidence (R. 493). This, he said, was because the arrest was lawful, and *anything* taken during a search following a lawful arrest could be used (R. 492). In doing so, he followed the rulings of the judge who presided at the criminal trial, who ruled that anything seized, a gun, stolen property, or anything else found could be availed of (R. 205).

The supreme court did not decide whether, considering the manner in which the confession was secured, it was admissible for any purpose. This question is not determined by confusing it with the privilege against self-incrimination.

So also, the supreme court did not decide whether, considering the way in which the confession came to be *written*, it could be treated as a confession. The decision of the supreme court upon the criminal appeal treated it as a confession and in the habeas corpus case the court refused to consider petitioner's arguments that it was not.

So here, resort to the state court "has failed to afford a full and fair adjudication of the federal questions raised," and petitioner properly presents her claims to the federal court.

***B. The state court erroneously decided important constitutional questions.***

That a conviction cannot rest on perjury, particularly when contrived by state officers, is established in the conscience of judges and the decisions of our



highest court. *Mooney v. Holohan*, 294 U.S. 103; *Pyle v. Kansas*, 317 U.S. 213; *White v. Reagen*, 324 U.S. 760; *Price v. Johnston*, 334 U.S. 266. Here the witness Jensen testified directly that he perjured himself when he said that Richard told him about the murder on Tuesday; and that he did so under threats from the sheriff's deputies (R. 391, 400) and pressure from the sheriff himself (R. 400). More important, the prosecutor knew it, or, at least, had information sufficient to cast doubt on the verity of this testimony (R. 508). The state court judge chose to treat the testimony of Jensen in the habeas corpus hearing as false (R. 495) and the supreme court held he was correct. *Hein v. Smith*, 35 Wn.2d 688, 215 P.2d 403.

***C. The denial of certiorari by the Supreme Court is not an adjudication of the merits of petitioners' claim.***

As the district judge said here, the jurisdiction of the Supreme Court is "selective" (R. 523). From the time review in the Supreme Court of judgments of state courts was changed from writ of error to writ of certiorari in 1916 (act of Sept. 6, 1916, 39 Stat. §726, ch. 448, and act of Feb. 13, 1935, 43 Stat. §936, ch. 229) the denial of certiorari has not imported any opinion on the merits of the case. Review as a matter of right disappeared, and the court was enabled to select the cases, which for one reason or another, it wanted to review.

At the present time only about one-sixth of the cases presented are reviewed on the merits. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917, 918. And because of the pressure of work and other reasons, it

is not possible for the court to give reasons for its denial of certiorari. *Id.*

The court, in *Darr v. Burford*, 339 U.S. 200, reaffirmed the requirement of an application to the Supreme Court for certiorari, but took pains to point out that denial of review imported no opinion on the merits. Wise administrative policy requires that the application be made, but there is no duty upon the court to hear it. And while the district court may take the application and its denial into account in exercising its proper discretion in passing upon the subsequent petition for habeas corpus, when it finds as here that it appears to have merit, and gives more than three months to the consideration to petitioner's claims, then the case is properly before the court. When it then issues its Certificate of Probable Cause the jurisdiction of this court is complete.

There could be many reasons why the Supreme Court was impelled to deny certiorari. A number of the reasons mentioned by Justice Frankfurter in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, might have moved them. The case seemed complicated, and the district judge's analysis might have been thought desirable. It was presented in forma pauperis which made the analysis more difficult. The prisoner had not appeared before the state tribunal in the habeas corpus proceeding (R. 362). The Petition for Certiorari was probably too long. Wiener, "Effective Appellate Advocacy," p. 240, and it may have been deemed necessary to have his testimony before the court.

But when all is said, it is the enormous pressure of business that determines whether a particular case is to be selected for review. Students of the court have pointed out the disgraceful situation that results from an over-crowded calendar. See "Melville Weston Fuller," by Willard L. King (New York, 1950) p. 148.

### CONCLUSION

Those of us who study criminal trials often notice how slight the evidence is to convict. But always there is something, some tangible, definite evidence leading irresistibly to the defendant, and which cannot be eliminated or explained away. But here there is nothing, simply nothing at all, because everything is entirely consistent with the hypotheses of innocence.

When we consider this, and the deliberate disregard of rudimentary standards of fairness, we can reach only one conclusion, and that is that Richard Hein is entitled to his freedom. Such should be the determination of this court. *Widner v. Johnson*, 136 F.2d 416.

Respectfully submitted,

JAMES TYNAN,

*Attorney for Appellant.*



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**BRIEF OF APPELLEE**

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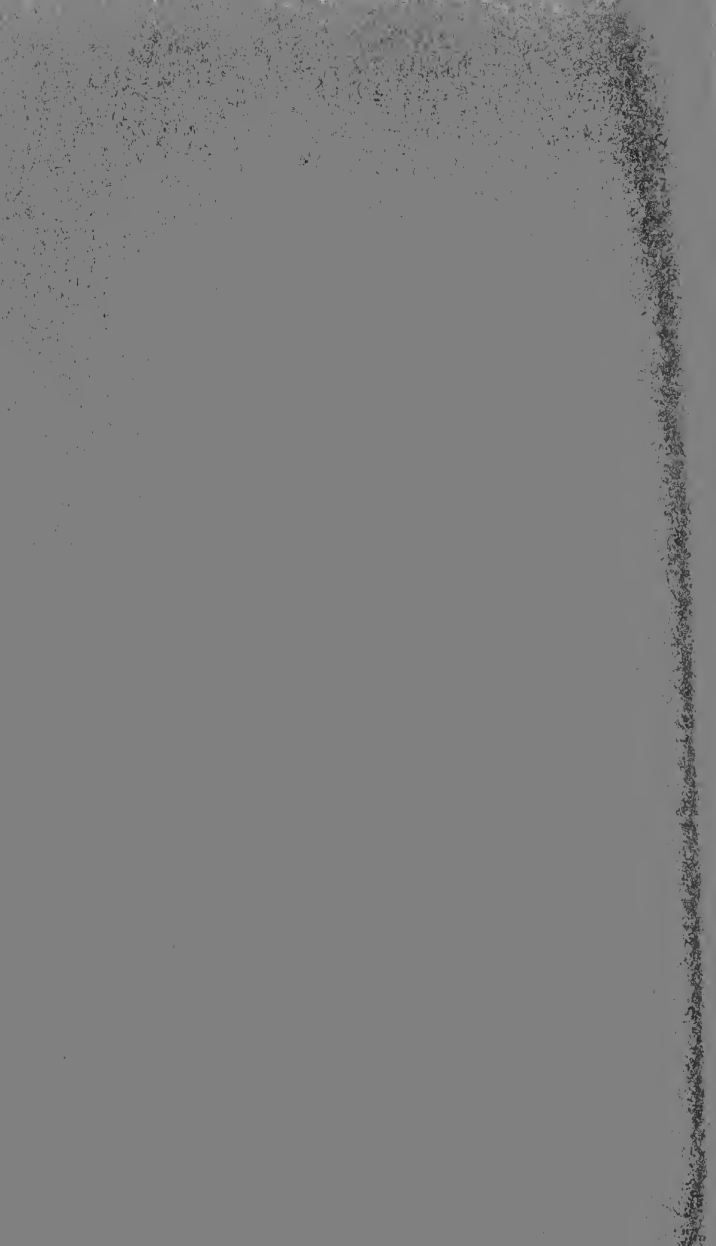
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**BRIEF OF APPELLEE**

---

JURISDICTION

The jurisdiction of the District Court to entertain the application for writ of habeas corpus is doubted. The jurisdiction to hear the appeal is found in 28 U.S.C.A. § 1291, pursuant to the issuance of a certificate of probable cause under 28 U.S.C.A. § 2253.

STATEMENT OF FACTS

**A. The Trial**

Appellant's statement of the case cannot be accepted as being fully supported by the record. It represents as

true, the testimony of witnesses who were disbelieved by the jury.

Late Tuesday afternoon, November 18, 1947, the body of an aged, blind, and crippled pensioner, James Moore, was found lying in a pool of blood in his blood-spattered home at Hartford, Washington. His head had been almost severed by the vicious strokes of a "sharp" "cutting instrument" (R. 691, 664). The splintered and bloody portions of his white cane, the bloody piece of stove wood found nearby, the condition of his face and head, and the shambles of the room, bore mute testimony to violence. Death had not come easy and thus the murderer, Richard Hein, wrote:

"He still grouned [sic] with pain so I took up a knife, and cut his throat and took the money he had with him which amounted up to \$15.80 and got out of there." (R. 845, Appellant's Br. 6).

Neither the victim's money nor billfold was found. The light globe had been shattered and its glass was found under and around the body. (R. 604, 663, 699).

Investigation presented the following proof:

On the morning of Saturday, November 15th, James Moore purchased a loaf of bread in a nearby grocery store. He received \$4.79 in change. His billfold, otherwise, contained only a ten-dollar bill. Richard Hein, who was in the store, left fifteen minutes later. (R. 837-841). The next day, Sunday, although Hein received but a small allowance (R. 975), he had at least \$11.00, including a ten-dollar bill. He purchased for himself and several boys, some of whom he knew but slightly, candy and ten gallons of gas. (R. 782, 785, 787, 945).

At school, on either Monday or Tuesday (R. 777), prior to the discovery of the murder, he told Inez Pitzer

and Ruth DeMonbrun that he had murdered James Moore to get a red hat. (R. 779, 953-954), and to "look in the paper for it." (R. 790). (R. 777-790). The evening newspaper contained nothing about the murder. (R. 777, see also 1086, 1087).

On Monday, Hein also informed one Joe Jensen, a school friend, that

"He went in to visit this man, James Moore, and he picked up the cane and hit the lamp, and broke the lamp; and then hit him on the back of the head with the cane, and the cane was broke. And then he went in and got some wood out of the kitchen there, and hit him across the eyes, and then he went over backwards.

"He knew he would probably squeal, or something, and he went in and got the knife, and cut his throat three times; took his money out of his billfold, \$15.00, and threw the knife in the junk yard." (R. 793, see also R. 504, 1148 *et seq*).

Joe told his grandmother, who advised silence so not to become involved. The following Thursday, Hein told Joe that two suspects were in jail already (R. 794).

Sheriff's deputies, upon hearing rumors, questioned Joe at school, both alone and in the presence of the principal (Mr. Niccolino, R. 1345). Joe told them of Hein's admissions (R. 794, 1139-1141). Hein was arrested at the local pool room and taken to the Sheriff's office where the statements were repeated to his face. All was transcribed (R. 504-509). Joe thought Hein was kidding until he saw the story in the paper (R. 505). Note that Joe Jensen, on November 24th, stated Hein had told him that he had thrown the knife "in the junk yard" (R. 504; R. 507):

Weaver:

"Q. How many times did he say he used the knife on him?

"A. About two or three times.

Sheridan:

"Q. What did he say he did with this knife?

"A. Threw it in the junk yard.

"Q. What junk yard?

"A. I don't know.

"Q. What junk yard, Richard?

"A. I didn't have the knife so I wouldn't know."

This was PRIOR to the discovery of the knife!!

Routine search of Hein disclosed, in a corner of his wallet, a note dated "November 17, 1947," (Monday) in which the murder of James Moore was described in accurate detail (R. 633-636, 726, 805, 508). Hein has alternately admitted and denied and said "maybe" as to the authorship of the note and such were his statements on the witness stand (R. 508, 962, 963, 973, 974-76). Hein's parents were notified and Hein jailed.

That night the night jailer saw a new face—Richard Hein's—in jail. He asked him what he was doing there (R. 772). Hein answered he was in for murder. The jailer asked:

"Who it was that he was supposed to have murdered?"

Hein answered: "The old man at Hartford."

"Q. Did you talk to him any further?

"A. I asked him if he murdered this man.

"Q. What was his response to that?"

Hein answered: "Uh-huh, but they'll have to prove it on me" (R. 773, 774).

Subsequently, on November 29th, the Moore kitchen knife, covered with blood, was found in a brush-covered junk yard not far from the Hein and the Moore homes

(R. 629-631, 647-653, 706-707, 739-740). Due to the passage of time and weather, whether the blood was human or animal could not be determined. Florence Moore, the wife of the victim, identified the knife (R. 761):

“Yes, sir. I have used that knife many a time, and that’s been scoured many a day.”

The defense was alibi—his father and mother knew accurately of his whereabouts from Saturday to Tuesday. The jury was strongly urged, as is this court, that Hein was but an imaginative schoolboy who had learned of the crime in the newspaper, then said he was the murderer. The defense neither did nor could explain how he knew where the murder weapon was to be found; how he knew in detail of the murder prior to its discovery, or why he admitted the murder subsequent to his arrest. Hein’s testimony was evasive and inconsistent. His reputation witnesses added nothing. His conviction was appealed but affirmed.

### **B. Habeas Corpus Proceedings in State Courts**

Thereafter, application was made to the Washington Supreme Court for a writ of *habeas corpus*. The show cause order was made returnable in Snohomish County Superior Court (No. 48277). The hearing lasted two days, and the application was denied.

Inez Pitzer testified that, as she remembered (twenty months later), Hein may have admitted the murder the latter part of the week rather than on Monday or Tuesday. However, she admitted that her statement, setting Hein’s admissions prior to the discovery of the murder, was written without coercion and must have been true (R. 1088):

“because I wouldn’t write anything that wasn’t true.”

Joe Jensen testified that he had been forced to lie at the previous trial (R. 1113-1189, 1325-1331), but he did not tell anyone he had lied because he didn't think it important. Inconsistently he admitted his longhand statement to be true (R. 1168), but later denied the matters set forth therein (R. 1169-1170). The trial judge thus described his testimony (R. 1409):

"The testimony of Joe Jenkins [sic] here upon the stand in this proceeding was so unsatisfactory, it was so inconsistent; there were so many discrepancies in it, that this court after hearing it all is firmly of the opinion that Joe Jenkins [sic] told the truth upon the witness stand, and that he did not tell the truth here before this court; that he told the truth at the time of the trial originally, but that he did not tell it here in court."

Jensen denied discussing the murder with his family upon seeing the FIRST newspaper account of the murder. This was repudiated by his own sister who testified upon arrival of this newspaper that Joe Jensen had declared he had been told all about the murder by the boy who committed it (R. 1397).

### **C. Habeas Corpus Proceeding in the District Court**

This was but another trial on previous contentions (See Finding XVI, R. 534). Counsel for appellant insisted upon and was permitted to present evidence going to guilt or innocence, a question already settled by the jury. Certain "new evidence" was supposedly presented.

MEAT CLEAVER: It was for the first time contended that the murder weapon had been a meat cleaver which had been known of but not produced at trial. Testimony was by a paid private detective whose business normally consisted of obtaining evidence in divorce cases (R. 92). His conclusion was based upon "one look" (R. 94) at the



corpse. The wounds could have been caused by a knife however (R. 92).

He first heard of the alleged cleaver when a mysterious stranger approached him and told him to buy a certain detective magazine (R. 87). For a reason unfathomable to the writer (who was not present at the hearing), the detective magazine was permitted as evidence, thus compounding fancy upon fancy.

**LIE DETECTOR TESTS:** The operator of this so-called test, "a salesman by the name of Gant" (R. 65), was not present at the trial, but a letter from him was presented by others. A motion to strike such evidence was granted (R. 66), because the test had not been administered by an expert.

**TRUTH SERUM TEST:** A young doctor with but six months' private practice (R. 58) who normally handled anesthesia in surgery gave this supposed test. This was his third attempt and the first in the last year. The first two therefore were while he was either a student or interne. He had taken no course of study on the subject (R. 59)—none existed, thus indicating the value placed upon such tests by the medical profession.

The doctor misrepresented that Hein was maintained at a level of drug influence where he could not count backward from one to ten (R. 51). However, the transcript of this "interview" (R. 102-121) discloses that Hein was NEVER so requested to count. Further, that on ALL occasions when asked to count he was able to do so in proper numerical sequence.

The statements of Hein, while drugged, are evasive, conflicting and perjurious, as was his testimony at the trial. Note:

1. R. 102—Hein denied *ever* being in the Moore home.

2. R. 104—He denied buying candy for the boys for whom he bought gas on Sunday.

3. R. 106—He answered “Yes and No” when asked if he ever told Joe Jensen he had killed a man.

4. R. 108—He answered “Yes and No, I don’t remember” when asked whether he told Jensen that he “had thrown a knife into a trash pile.”

5. R. 109, 113—He denied telling a girl that he had killed a man for his red hat, although he admitted this at the trial (R. 851, 953-954).

6. R. 114—He admitted grand larceny of federal funds from a postmistress, but denied, to the surprise of his interviewers, that he on another occasion broke into a grocery store (R. 116).

The “test” merely showed that Richard Hein could lie as well while drugged as while sober.

#### **D. Prior Judicial Determinations**

Richard Hein’s trial has been judicially determined to have been fair on the following previous occasions (Findings R. 529-538):

(1) The trial: (Snohomish County No. 801) in which the confession was contested by (a) motion to suppress prior to trial, (b) objection and argument during trial, and (c) motion for new trial.

(2) Conviction affirmed on appeal: *State v. Hein*, 32 Wn. (2d) 315, 201, P. (2d) 691 (1949). Petition for rehearing denied, 32 Wn. (2d) 323.

(3) The application for writ of *habeas corpus* to the Washington Supreme Court (No. 31139), and the show cause order, returnable before the Snohomish County Superior Court, No. 48277, resulting in a full two-day hearing and denial of the petition.

(4) Affirmed on appeal. *In re Hein v. Smith*, 35 Wn. (2d) 688, 215 P. (2d) 403 (1950). Matters there alleged are identical to matters alleged in the district court (Finding VI, R. 531).

(5) While the latter appeal was pending, the prisoner moved for a new trial in the Superior Court. This was contested and denied.

(6) An original writ of mandate was then sought against the lower court in Washington Supreme Court No. 31375. This was denied.

(7) Petitioner then sought certiorari. The petition, copy of which is an exhibit herein, contained approximately 264 typewritten pages, all basically alleging the identical issues presented here. The petition was denied. *Hein v. Smith*, 340 U. S. 837 (1950).

(8) The hearing on the application for writ of *habeas corpus* and show cause order in Federal District Court, and

(9) This appeal.

### **E. State of Record**

The original state court records are on file herein. The confused record on appeal results from the appellant (apparently feeling this court was appellate to the State trial court), designating as relying on appeal that due process was violated because of an entire absence of evidence to convict (R. 551), and then excerpting only portions of the testimony. In view of this designation and the quoting from context, appellee designated all those portions of the record omitted by appellant. Appellee furnished, at its own expense, copies of the complete transcripts of the original trial and of the *habeas corpus* hearing in Snohomish County. The lower

court ordered this to be Volumes 4 and 5 of the record on this appeal.

Judge Driver, however, while admitting appellee's right to the full record and permitting such copies to be furnished, also included appellant's excerpted portions, thus leading to the duplication. R. 125-331 and R. 351-503 consists of testimony duplicated in Volumes 4 and 5, the complete transcripts.

#### APPELLANT'S ASSIGNMENTS OF ERROR

We call to the attention of the court that appellant's assignments of error (App. Br. 15-16) materially vary from his "Points to be Relied Upon On Appeal" (R. 551). See Federal Rule of Civil Procedure, 75 (d). Further, his argument doesn't appear to follow either (see Appellant's Index, Br. iii, iv).

## SUMMARY OF ARGUMENT

## I.

## THE APPLICATION SHOULD NOT HAVE BEEN ENTERTAINED

The district court has no jurisdiction except where granted by Congress, which body has stated the "APPLICATION" for writs of *habeas corpus* from prisoners confined in state institutions "SHALL NOT BE GRANTED" if state remedies are still open "*by any available procedure*," 28 U.S.C.A. § 2254. The effect is to eliminate the right to apply to lower Federal courts for *habeas corpus* in all states in which successive applications may be made for *habeas corpus* to the state courts. 8 *Fed. Rule Dec.* 176. A contrary rule is a condemnation of the integrity of all state judges.

## II.

## CONFESSION

The confession was recovered subsequent to and as an incident of lawful search and seizure. There can be no question as to its probity—its weight was for the jury. The defense admitted its authorship, but strongly urged upon the jury that it was but a product of boyhood imagination. Failing that, appellant now attempts to so convince this court. The trial judge did not give a special instruction regarding it for fear of lending it too much emphasis. However, instruction No. 10 (R. 1015), regarding "such admissions or confessions" properly advised the jury of the applicable law. Failure to give a non-requested instruction can hardly be a basis for *habeas corpus*.

## III.

## ALLEGED PERJURY

The evidence completely sustains the finding of the lower court that no perjury was committed at the trial. Joe Jensen's testimony at the state *habeas corpus* hearing wherein he "admitted" previous perjury was too evasive and inconsistent for belief. His subsequent affidavit admits he told the truth at the trial and not the state *habeas corpus* hearing.

## IV.

## ADMISSION SUBSEQUENT TO ARREST

It goes without citation that an UNCOERCED admission made by an accused to a police officer is admissible in evidence. Appellant's contentions would eliminate all confessions. This contention is first made on this appeal.

## V.

## TESTIMONY OF PHYLLIS MOOTZ

The opinion of Phyllis Mootz that Hein's denial of guilt was not emphatic, was invited and explored by defense on cross-examination. This contention also is first made in this court.

## VI.

## TRUTH SERUM

Statements made while under the influence of drugs are unreliable and admittedly inadmissible in a criminal trial. Since they go only to guilt or innocence, they are inadmissible in a *habeas corpus* proceeding.

## VII.

## EFFECT OF CERTIORARI

Contrary to appellant, the district court lent too *little* emphasis to the effect of the denial of *certiorari* on identical contentions.

## ARGUMENT

## I.

THE DISTRICT COURT SHOULD NOT HAVE  
ENTERTAINED THE APPLICATION

Congress, under Art. I, § 8, cl. 9, of the United States Constitution, has the power to create federal courts inferior to the Supreme Court and to define and limit their jurisdiction. See *Kline v. Burke Construction Co.*, 260 U. S. 226, 234 (1922):

“Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion provided it be not extended beyond the boundaries fixed by the Constitution. *Turner v. Bank of North America*, 4 Dall. 8, 10; *United States v. Hudson and Goodwin*, 7 Cranch, 32; *Sheldon v. Sill*, 8 How. 441, 448; *Stevenson v. Fain*, 195 U.S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. *Nashville v. Cooper*, 6 Wall. 247, 252. And the jurisdiction, having been conferred, may, at the will of Congress, be taken away in whole or in part; and, if withdrawn without a saving clause, all pending cases, though cognizable when commenced, must fall. *Assessors v. Osborne*, 9 Wall. 567, 575.”

See also, *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 330 (1938); *Railroad Co. v. Grant*, 98 U. S. 398, 401, 402

(1878), and many cases cited; *Lockerty v. Phillips*, 319 U. S. 182, 187 (1942); *Ex Parte McCardle*, 7 Wall. 506, 514 (1868) *habeas corpus*; *Norris v. Crocker*, 13 How. 429, 439, 440 (1850); *Insurance Co. v. Ritchie*, 5 Wall. 541, 544 (1866); *Smallwood v. Gallardo*, 275 U. S. 56 (1927).

For a recent case in this Circuit, see *Potter v. Kaiser Company*, 171 F. (2d) 705 (9-Cir. 1949), which held valid the right of Congress to divest Federal courts of jurisdiction to hear portal to portal cases.

### A. Exhaustion of State Remedies

Federal district courts have no inherent power to review state action by *habeas corpus*. Their jurisdiction is solely that which is granted them by Congress. 28 U.S.C.A. § 2254, provides:

“STATE CUSTODY; REMEDIES IN STATE COURTS. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court *shall not be granted* unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

“An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, *by any available procedure*, the question presented.” (Emphasis supplied.)

There are two exceptions: (1) If state remedies have been already exhausted or no longer exist, and (2) the existence “of circumstances rendering such process ineffective to protect the rights of the prisoner.”

John J. Parker, Chief Judge of the Court of Appeals for the Fourth Circuit was the Chairman of the Judicial



Conference of Senior Circuit Judges Committee appointed in 1942 to investigate, analyze, and make recommendations as to the correction of the abuses then (and now) rampant in *habeas corpus* matters. These recommendations were enacted into law by Congress after the Committee of the Judiciary, the Committee on the Revision of the Judicial Code, and the Congress had passed upon them.

Judge Parker thoroughly analyzes Federal *habeas corpus* procedure in his article "Limiting the Abuse of Habeas Corpus," 8 *Fed. Rules Dec.* 171-178 (1948). He states:

"The effect of this last provision is to eliminate, for all practical purposes, the right to apply to the lower federal courts in all states in which successive applications may be made for habeas corpus to the state courts; for in all such states, the applicant has the right, notwithstanding the denial of prior applications, to apply again to the state courts for habeas corpus and to have action upon such later application reviewed by the Supreme Court of the United States on application for certiorari." 8 *Fed. Rules Dec.* 786.

"The thing in mind in drafting this section was to provide the review of state court action to be had so far as possible only by the supreme court of the United States, whose review of such action has historical basis, and that review NOT BE HAD by the lower federal courts whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction." (Emphasis supplied.)

Judge Parker's article is quoted with approval in *Darr v. Burford*, 339 U. S. 200, 212 (1949) at footnote 34; *Adkins v. Smyth*, 188 F. (2d) 452 (4-Cir. 1951); *Stonebreaker v. Smyth*, 163 F. (2d) 498, 501 (4-Cir. 1947):

"The former proceeding [*habeas corpus*] in the state court will not preclude the filing of a petition now, since the principle of *res adjudicata* is no more

applicable to habeas corpus proceedings in the courts of Virginia than in the federal courts; and until action in the state courts has been invoked on the basis of the decision relied on, it cannot be said that state remedies have been exhausted in the present status of the case so as to justify resort to the federal jurisdiction."

There is no question but that the Washington Supreme Court does grant hearings on successive applications for *habeas corpus*. This was admitted by the district court below. (R. 525, 526.) See *In re Voight*, 130 Wash. 140, 226 P. (2d) 482 (1924); *Voigt v. Mahoney*, 10 Wn. (2d) 157, 116 P. (2d) 300 (1941); see also *Jones v. Cranor*, Wash. Sup. Ct. Nos. 31122, 31237 and 35 Wn. (2d) 938, 212 P. (2d) 776 (1949); *George Latimer v. Cranor*, Wash. Sup. Ct. Nos. 27973, 28216, 29244, 29472, 29533, 31157 and 31667, and 184 F. (2d) 185 (9-Cir. 1950).

The scope of Washington state *habeas corpus* inquiry is as broad as the Federal writ. *In re Whipple v. Smith*, 33 Wn. (2d) 615, 617, 206 P. (2d) 510 (1949). *Rem. Rev. Stat.*, § 1075 (1947 Supp.) permits an application on writ of *habeas corpus*,

"where it is alleged in the petition that rights guaranteed the petitioner by the Constitution of the State of Washington or of the United States have been violated."

*Res adjudicata* as to *habeas corpus* is no more applicable in state than in Federal courts.

*Darr v. Burford*, 339 U. S. 200, 216 (1949) thoroughly analyzed many of the previous cases. The opinion therein states:

"This court has evolved a procedure which assures an examination into the substance of a prisoner's protest against unconstitutional detention without allowing destructive abuse of the precious

guarantee of the Great Writ. Congress has specifically approved it \* \* \*

"It is this court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal *only* by this court and that a state's system for the administration of justice should be condemned as constitutionally inadequate *only by this court*. From this conviction springs the requirement of prior application to this court to avoid unseemly interference by federal district courts with state criminal administration. \* \* \*

"Oklahoma denied *habeas corpus* after obviously careful consideration. *If that denial violated federal constitutional rights, the remedy was here, not in the district court* and the district court properly refused to examine the merits." (Emphasis supplied)

See also *Salinger v. Loisel*, 265 U.S. 224 (1923).

The purpose of the doctrine is obvious. Otherwise, a single federal district court judge would constitute a court of appeal to not only the Superior, but the Supreme Court of the State of Washington.

It would hold that the judges of this state are either incapable or unwilling to uphold their judicial oaths and duties, in the determination of constitutional questions applicable to the "American," not solely "Federal," theory of fair trials. See 8 *Federal Rules Dec.*, *supra*, at 176. *Adkins v. Smyth*, *supra*, 188 F. (2d) 452 and *Stonebreaker v. Smyth*, *supra*, 163 F. (2d) 499, both stating:

"It would be intolerable that a federal district court should release a prisoner on *habeas corpus* after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on *certiorari*. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state."

Where state remedies have not been exhausted, the application “*shall not be granted.*” Jurisdictionally stronger language could hardly be found. That 28 U.S.C.A. § 2254 is a matter of “jurisdiction,” see *Stonebreaker v. Smythe*, 163 F. (2d) 498 *supra*. *Hawk v. Jones*, 160 F. (2d) 807 (8-Cir. 1947) *cert. denied* 332 U.S. 779; *U.S. ex rel. Carter v. Ragan*, 153 F. (2d) 902 (7-Cir. 1946); and see *United States ex rel. Foley v. Reagan*, 143 F. (2d) 774 (7-Cir. 1944).

The existence of state remedies applies to the availability of “hearings” not the sure release of the petitioner. The Freedom Writ, 61 Harv. L. Rev. 657, 668:

“Whenever all evidence of alleged unfairness was fully litigated before a competent tribunal, subsequent collateral attack by *habeas corpus* is not normally permissible. Such complete litigation of the alleged unfairness is itself the fairness to which the defendant was entitled.”

### **B. Exceptional Circumstances Doctrine**

Under 28 U.S.C.A. § 2254, federal courts may entertain applications for *habeas corpus* from prisoners in state institutions on occasion of

“the existence of circumstances rendering such [state] process ineffective to protect the rights of the prisoner.”

This appears to be the previous “Exceptional circumstances of peculiar urgency doctrine.” *Ashe v. U. S. ex rel. Valotta*, 270 U.S. 424 (1926); *Baker v. Guce*, 169 U.S. 284 (1898); *Buchanan v. O'Brien*, 181 F. (2d) 601 (4-Cir. 1950); *U.S. ex rel. Murphy v. Murphy*, 108 F. (2d) 861 (2-Cir. 1940) *cert. denied* 309 U.S. 661; *U.S. ex rel. Ray v. Martin*, 141 F. (2d) 300 (2-Cir. 1944); *Slaughter v. Wright*, 135 F. (2d) 613 (5-Cir. 1943); *Johnson v. Wilson*, 131 F. (2d) 1, (5-Cir. 1942); *McClaude v. Majors*, 102 F. (2d) 128

(5-Cir. 1939); *Potter v. Dowd*, 146 F. (2d) 244 (7-Cir. 1944) and see dissent; *Kelly v. Dowd*, 140 F. (2d) 81 (7-Cir. 1944), *cert. denied* 320 U.S. 786 and 321 U.S. 783; *Hart v. Olson*, 130 F. (2d) 910 (8-Cir. 1942) *cert. denied* 317 U.S. 697; *Gebhart v. Amrine*, 117 F. (2d) 995 (10-Cir. 1941).

For previous cases in this court see *Hogue v. Duffie*, 124 F. (2d) 864 (9-Cir. 1942) *cert. denied* 316 U.S. 675; *Palmer v. McCauley*, 103 F. (2d) 300, (9-Cir. 1939); *Paul v. People of State of California*, 79 F. (2d) 132 (9-Cir. 1935) foll. in 91 F. (2d) 1016, *cert. denied* 303 U.S. 636, and *Bird v. Smith*, 175 F. (2d) 260 (9-Cir. 1949) see *Ex parte Hawke*, 321 U.S. 114 (1944); *Darr v. Burford*, *supra*:

“The exceptions are few, but they exist.”

See also 65 A.L.R. 733; 25 *Am. Jur.* 155, *Habeas Corpus*, § 18; *United States ex rel. Kennedy v. Tyler*, 269 U.S. 15, 17-19 (1925):

“The due and orderly procedure of justice in a state court is not to be interfered with [by *habeas corpus* in a Federal district court] save in rare cases, where exceptional circumstances of peculiar urgency are shown to exist.” Citing many cases.

Such exceptional circumstances require (1) necessity for a prompt disposition, and (2) cases, for instance:

“‘Involving the authority and operations of the general government or the obligations of this country to, or its relations with, foreign nations.’” *Urquhart v. Brown*, 205 U.S. 179, 182 (1907).

While a more particular definition of “exceptional circumstances” and “peculiar urgency” is not found, all cases agree that the mere fact of imprisonment where federal constitutional rights are involved is not sufficient.

The petition contains no allegations and the record no facts, even inferring that this case is either exceptional or urgent. Further, this court has held that Washington remedies have not yet been exhausted when the writ of *coram nobis* has not been sought. *United States ex rel. White v. Walsh*, 174 F. (2d) 49 (9-Cir. 1949); *Hanson v. Smith*, 162 F. (2d) 334 (9-Cir. 1947); and *Thompson v. Smith*, 161 F. (2d) 728 (9-Cir. 1947).

Thus, (1) Washington remedies have not yet been exhausted, and (2) exceptional circumstances of peculiar urgency are neither present nor alleged. Where such is true, Congress has stated that an "application" for writ of *habeas corpus* "Shall Not Be Granted." The prohibitory language could not be stronger. It was, therefore, jurisdictionally erroneous to grant the application and the ultimate denial of the petition was proper.

## II

### THE CONFESSION

#### A. As Incident to Lawful Arrest

The original trial court found as a matter of fact that the confession was found subsequent, and incident to lawful arrest (R. 835). Apparently, on appeal, no serious contention was made that this was not so. *State v. Hein*, 32 Wn. (2d) 315, 317, 201 P. (2d) 691 (1949).

The trial judge who took testimony in the state *habeas corpus* hearing also so found (R. 1406). This too, was affirmed on appeal. *In re Hein v. Smith*, 35 Wn. (2d) 688, 689, 215 P. (2d) 403 (1950). Judge Driver made a specific finding to this effect (R. 533):

"The confession has been uniformly held to have been taken from Richard Hein, the defendant, subsequent to and as an incident of lawful arrest. After

full consideration of the evidence as it appears from the records, I also so find."

Appellant apparently concedes at page 26 of his brief, "B", that the arrest was lawful, and the confession would be proper as long as not coerced or improperly induced. No inducement to the writing is, or could be alleged (Judge Driver's letter to counsel R. 513-514). The evidence herein, clearly preponderates in favor of the court's finding and should again be affirmed.

4 Wigmore on Evidence 20, Admissions, § 1058:

"It is immaterial that the admission, when made in writing, is found in a paper *retained by the maker*, and not communicated to anyone else. This is because the statement none the less represents a deliberate utterance of the party, even though he retains it in his own custody and undisclosed."

### **B. Use of the Confession in Evidence**

Appellant contends that under Washington law, that the confession was inadmissible. This is about as conclusively as possible refuted by *In re Hein v. Smith*, 35 Wn. (2d) 688, 215 P. (2d) 403 (1950) where these matters were strenuously urged but denied. But see also *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382 (1893) and *State v. Royce*, 38 Wash. 111, 80 Pac. 268 (1905).

The following quotations from Wigmore are apposite, 4 Wigmore on Evidence, *supra*, 7, Admissions, § 1050:

"A Confession is one species of Admission, namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge (*Ante*, § 821). The peculiarity of Confessions in evidence is that they are subjected to the additional limitation when offered in criminal cases,—the limitation that they must have been made without any inducement calculated to destroy their trustworthiness" \* \* \* \* .

"Since a Confession is merely one sort of an Admission, *all admissions are usable against the accused in a criminal case.*"

Appellant admits in his brief at page 24 that the document is a confession. As Judge Driver concluded (R. 536):

"The document in the handwriting of Richard Hein which set forth the manner in which he purportedly committed the murder was written by him entirely voluntary and of his own accord. It could in no sense be a coerced or improperly induced confession. It was taken subsequent and incident to lawful arrest by state officers in a state court."

The federal fourteenth amendment, therefore does not forbid its use as the fruit of an unreasonable search and seizure. *Wolfe v. Colorado*, 338 U. S. 25 (1949); *Elwood v. Smith*, 164 F. (2d) 449 (9-Cir. 1947).

### III

#### ALLEGED PERJURY

This contention does not seem to be as strongly urged as previously. Joe Jensen testified at the State *habeas corpus* hearing that he had lied at the trial upon threat of certain police officers. His testimony was inconsistent, wavering, and contradicted by not only police officers, but his own sister.

Judge Driver found (R. 534-535):

"The trial judge who was in a position to hear the witnesses and consider their appearance, conduct and demeanor on the witness stand, found not only that the enforcement and prosecutive officers neither induced nor knowingly used perjured testimony of the witness Jensen, but that Jensen did not give perjured testimony at the trial. (See the trial judge's oral decision in finding VIII [R. 532] above). I also so find.



## “XII

“Thorough examination of the cold records leads me to the same conclusion as that expressed by the state court trial judge in the foregoing quotation (Finding VIII).”

Further, Joe Jensen later admitted, by affidavit found in the mandamus proceeding on file herein that he told the truth at the trial. Judge Driver’s letter to counsel (R. 515). The record supports these findings.

## IV

### ADMISSION SUBSEQUENT TO ARREST

Hein, after his arrest, was conversing with the night jailor and admitted the crime. Appellant contends that although there was no coercion or duress, (and the admission was not and is not denied), that this admission was not admissible because at some other time, in some other jail, and with some other defendant, there *may* be coercion.

But to state the proposition is to refute it, but see 4 *Wigmore on Evidence*, 7 *supra*, that all admissions, not obtained by duress, are admissible in a criminal trial. *Bram v. United States*, 168 U. S. 532 (1897) merely holds that a confession or admission obtained by duress and improper inducement is inadmissible in a Federal trial. With this we have no quarrel. However, here, there is neither showing nor contention that Hein’s admission of guilt was anything but voluntary.

However, a more simple answer to this contention is that it is made for the first time on appeal. Neither the petition (R. 1-14) nor the district court proceedings disclose it. It is elementary, that except as to lack of jurisdiction, that matters not alleged at trial cannot be heard on appeal. *Boyce v. Chemical Plasters*, 175 F. (2d) 839, 843 (8-Cir. 1949).

## V

## TESTIMONY OF PHYLLIS MOOTZ

Appellant's imaginative efforts to show a violation of due process lead him to the rather astounding contention that the prosecutor controlled cross-examination by defense counsel.

Miss Mootz, the secretary to the prosecutor, took shorthand notes of the questioning of Hein in the presence of Joe Jensen. She testified as to matters which there occurred and to Hein's threatening Jensen for his disclosures. On cross-examination (R. 810-813), the defense was by exploration, attempting to get her to state (and to convey the impression to the jury) that Hein constantly and vigorously denied his guilt. After several such questions, in answer to:

"He denied throughout their conversation and throughout all of the questioning they gave him there, that he killed Mr. Moore?"

She stated:

"Yes, but he wasn't emphatic about it."

The defense then, without moving to strike, explored this at some length in an effort to show prejudice.

This contention also was not made in the district court and is thus improperly made here. The same is true concerning appellant's contentions regarding the attempt made at trial, without objection (R. 873-875) to impeach the step-father of Hein.

## VI

## TRUTH SERUM

As attractive a solution to the problem of crime the so-called "truth-serum" test may seem to be, it was error to admit such in evidence. Appellant admitted that it and the lie-detector test were "probably inadmissible" in a criminal trial (R. 535).

Not only did an inexperienced and untrained young doctor perform it; but, he misrepresented to the court the level of consciousness maintained; the questions were clearly leading; were prepared by persons interested in the defense and/or paid to be so; no other doctor was present, and of course, there was no opportunity for cross-examination.

Lie detector tests are uniformly held inadmissible as not sufficiently reliable. Cases cited in 20 Am. Jur. 633, *Evidence*, § 762; 34 A.L.R. 147 (1924), 86 A. L. R. 616 (1933), 119 A. L. R. 1200 (1939), and 139 A. L. R. 1172 (1942).

Only one case has been located in which "truth-serum" has been offered in evidence. *State v. Hudson*, 289 S. W. 920 (Mo. 1926). The rejection of such evidence by the trial court was affirmed and the court stated:

"It was sought to introduce in evidence the deposition of a doctor residing elsewhere, who testified to the effect that he had administered to the defendant what he termed a 'truth-telling serum,' and that while under its influence the defendant had denied his guilt. Testimony of this character—barring the sufficient fact that it cannot be otherwise classified than as a self-serving declaration—is, in the present state of human knowledge, unworthy of serious consideration. We are not told from what well this serum is drawn or in what alembic its alleged truth-compelling powers are distilled. Its origin is as nebulous

as its effect is uncertain. A belief in its potency, if it has any existence, is confined to the modern Cagliostro, who still, as Balsamo did of old, cozen the credulous for a quid pro quo, by inducing them to believe in the magic powers of philters, potions and cures by faith. The trial court therefore, whether it assigned a reason for its action or not, ruled correctly in excluding this clap-trap from the consideration of the jury. Cogent reasons based upon numerous rulings, cited in the respondent's brief, bear ample testimony to support the wisdom of the court's ruling."

See Despres, *Legal Aspects of Drug Induced States*, 14 *Univ. of Chi. L. Rev.* 601 (1947) wherein the author quotes from Doctors Sargant and Slater, *An Introduction to Somatic Methods of Treatment in Psychiatry* (1944), in describing the effect of sodium pentothol and related drugs:

"It is commonplace that under the influence of alcohol a man reveals tendencies that remain hidden in everyday life and may become suggestible, obstinate, euphoric, or boastful. Tongues are loosened by drink; critical judgment is suspended and secret aspirations, damaging confessions, and dramatic falsifications of previous events come pouring out. Psychiatry has taken a trick and turned it into a technique. But what it now sometimes graced with the high-sounding title of 'narcoanalysis' is no more than the method employed from time immemorial by the colonel in the mess to discover the qualities of the newest subaltern. Instead of alcohol, whose effects take some time to produce, are unreliable and difficult to control, we now employ a barbiturate to which these objections do not apply. But the effects are much the same. Both in the normal, the neurotic, and the psychotic, the drug abolishes inhibitions and allows underlying thought processes and preoccupations to appear. In addition, if there is much associated anxiety, this is partly at least abolished. The great value of the intravenous barbiturate for diagnostic purposes in the psychotic is sometimes not sufficiently realized. Under the influence of a suit-

able dose, the retarded depressive may become free, able to talk, and even cheerful. \* \* \* There is reduction of the critical sense, an enhancement of rapport, and often a pouring out of both truth and fantasy equally. Aggressive feelings, which would terrify the individual in his normal state, can be expressed without excessive anxiety and the emotional experiences of the past can be lived anew without disturbances of the autonomic equilibrium."

See also Lorenz, *Criminal Confessions Under Narcosis*, 31 Wis. Med. J. 245 (1932).

Further, the only possible purpose of such tests went to the guilt or innocence of Hein. The jury verdict, under proper instructions, after a fair trial, had foreclosed this question.

## VII.

### EFFECT OF DENIAL OF CERTIORARI

Appellants extended argument that the denial of *certiorari* in *habeas corpus* cases is entirely without significance, appears answered by *Darr v. Burford*, *supra*, 339 U. S. 216:

"This court has evolved a procedure which assures an examination into the substance of a prisoner's protest against unconstitutional detention without allowing destructive abuse of the precious guarantee of the Great Writ. Congress has specifically approved it \* \* \* .

"It is this court's conviction that orderly Federal procedure under our dual system of government DEMANDS that the state's highest courts should ordinarily be subject to reversal ONLY BY THIS COURT.

\* \* \*

"Oklahoma denied habeas corpus after obviously careful consideration. IF THAT DENIAL VIOLATED FEDERAL CONSTITUTIONAL RIGHTS, THE REMEDY WAS HERE, NOT IN THE DISTRICT COURT \* \* \* ." (Emphasis supplied.)

The district court naturally gave due weight to the prior adjudications. This duty is enjoined upon it by the Supreme Court. *Salinger v. Loisel, supra*, 265 U. S. 230-231:

“At common law the doctrine of *res adjudicata* did not extend to a decision on habeas corpus refusing to discharge the prisoner. \* \* \*

“But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered. In early times, when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of number. But when a right to an appellate review was given, the reason for that practice ceased, and the practice came to be materially changed,—just as when a right to a comprehensive review in criminal cases was given, the scope of inquiry deemed admissible on habeas corpus came to be relatively narrowed \* \* \*

“Among the matters which may be considered, and even given controlling weight, are \* \* \* a prior refusal to discharge on a like application.

*Stonebreaker v. Smyth, supra*, 163 F. (2d) 499:

“The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it had thought that the record showed a denial of petitioner’s constitutional rights, certiorari would have been granted and petitioner would have been afforded relief.”

The United States Supreme Court and its individual justices have never been loath to intercede in behalf of state prisoners where the petition for *certiorari* disclosed a violation of constitutional rights. They too are cognizant of their judicial duty to guard individual rights.

## CONCLUSION

The following is applicable to the trial judges below,  
*In Re Hein v. Smith, supra*, 35 Wn. (2d) 694:

"The judge who heard the *habeas corpus* matter did not preside at the original trial. At this hearing, he allowed great latitude in the examination of witnesses. He considered the age of the boy. He appreciated the fact that it was his duty to protect this boy in all rights guaranteed to him under the constitution. He was patient and fair. From the record, he could not have decided otherwise."

A more proper conclusion could not be found than the words of the Honorable Ralph C. Bell when he sentenced Richard Hein to life imprisonment in the Washington State Penitentiary (R. 1029):

"I heard very much, or considerable, during the presentation of this cause of recognition by our system of government and of laws, of the dignity, the security of man, and the individual. This has applied to you on trial. I could not help but wonder whether the dignity of man and the individual, as applied to poor old James Moore was being forgotten. For the first right of all of us is to enjoy life,—to have it, and to live. And as one who is guilty, you have taken the life of an old, peaceful, harmless, quite nearly blind man, and you must answer to the penalty of the law."

Respectfully submitted,

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JENNINGS P. FELIX,  
*Assistant Attorney General,*

HAROLD J. HALL,  
*Deputy Prosecuting Attorney, Snohomish County,*

*Attorneys for Appellee.*





No. 13027

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**United States Court of Appeals**  
**For the Ninth Circuit**

---

CATHERINE HEIN,

*Appellant,*

— vs. —

JOHN R. CRANOR, Superintendent of the Washington  
State Penitentiary at Walla Walla, Washington,  
*Appellee.*

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APPEAL FROM JUDGMENT OF THE DISTRICT COURT  
OF THE EASTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

---

**APPELLANT'S REPLY BRIEF**

---

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PAUL P. O'BRIEN

CLERK



**United States Court of Appeals**  
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**United States Court of Appeals**  
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Walla Walla, Washington, *Appellee.*

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No. 13027

APPEAL FROM JUDGMENT OF THE DISTRICT COURT  
OF THE EASTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

---

**APPELLANT'S REPLY BRIEF**

---

The answering brief of appellee makes two contentions that call for reply. These are, that the district court had no jurisdiction to hear this case; and that Richard Hein is guilty, and that no perjury was committed at his trial. It is significant that no attempt is made to answer appellant's main contentions: that Exhibit "H" is inherently worthless; and that it was taken from the accused by force.

**I.**

**State Remedies Have Been Exhausted, and No Further Right Exists to Apply for Relief in the State Courts.**

**A. The decision of the Washington Supreme Court is *res judicata* of petitioner's claims in the state courts.**

Appellee advances the argument that notwithstanding the decision of the supreme court in *Hein v. Smith*, 35 Wn.2d 688, 215 P.2d 403, another hearing

would be allowed upon a second petition in the state court. He says, "There is no question but that the Washington Supreme Court does grant hearings upon successive applications for *habeas corpus*" (p. 20).

This is not the law of Washington.

*In re Clifford*, 37 Wash. 460, 79 Pac. 1001,  
107 Am. St. Rep. 819;

*In re Graham*, 7 Wash. 237, 34 Pac. 931;

*In re Foye*, 21 Wash. 250, 57 Pac. 825;

*Ex parte Emich*, 124 Wash. 401, 214 Pac.  
1043;

*Voight v. Mahoney*, 10 Wn.2d 157, 116 P.  
2d 300.

In the *Clifford* case a decree of adoption was attacked by habeas corpus. In an opinion written by Judge Rudkin, the court held that an order dismissing the proceeding, after a hearing and the entry of findings, was *res judicata* of subsequent proceedings involving the same parties and the same facts. In the *Graham* case, it was held that a judgment in habeas corpus was reviewable; consequently, the judgment of an inferior court, from which no appeal was taken, was final and binding, and the petitioner could not address a second petition to another court or judge. The court said:

"The object in giving every judge in the state original jurisdiction, no doubt, was to place the remedy within easy reach of the applicant and insure him speedy relief when he was entitled to such; and not to give him a multiplicity of trials. It is true that in some of the states the practice is different; but such practice does not commend



itself to our judgment, and we cannot follow it. When one trial has been accorded the petitioner he has secured all the rights which the law has guaranteed him."

In the *Foye* case, it was contended that no appeal would lie in Washington from an order dismissing a petition for habeas corpus, because successive applications could be made and, therefore, the doctrine of *res judicata* did not apply. But the court, while conceding that while perhaps a majority of courts held this view, refused to adopt it; and held that a judgment in *habeas corpus*, like any other judgment, was appealable and, consequently, a final judgment in *habeas corpus* was *res judicata*.

*Voight v. Mahoney*, 10 Wn.2d 157, 116 P.2d 300, *supra*, is cited in appellee's brief (p. 20). It was a second proceeding in habeas corpus by a prisoner in the penitentiary. The prisoner was serving a life sentence and had sought a writ in 1924, *In re Voight*, 130 Wash. 140, 226 Pac. 482. The grounds of both petitions were the same, *i.e.*: that the trial court lacked jurisdiction because a jury was not empanelled to try the first-degree murder charge. In the first case it had been held that the judgment, while irregular, was not void; and in the second, decided in 1941, it was held that the determination of that case controlled the second proceeding. The reason for considering the second petition was that new grounds were alleged to have arisen.

It is apparent, in light of these authorities, that another proceeding in the state court would not be proper, and would not be entertained.

It is not correct that the Washington supreme court, or the trial courts, entertain successive applications for habeas corpus. The decisions cited on page 20 of appellee's brief do not support this view. Nor do the Washington courts allow successive applications as a matter of practice. Quite the contrary; the presentation of successive applications would be deemed frivolous, and a trifling with the court. The district judge, although requested by appellee to make a finding that successive applications could be made, refused to do so.

There is no need to discuss the "exceptional-cases-of-peculiar-urgency" doctrine. It was pointed out in our brief (p. 64) that the doctrine was laid down in a case where the petitioner had not exhausted his state remedies, and that it was held by the Supreme Court not to be applicable in a case like this. *Ex parte Hawk*, 321 U.S. 114. The "exceptional circumstances" doctrine is invoked only to justify a departure from the rule requiring exhaustion of state remedies; and the quotation in appellee's brief (p. 23) that, "the exceptions are few, but they exist," from *Darr v. Burford*, 339 U.S. 200, 210, has application only to such a situation. In *United States ex rel. Cook v. Dowd*, 180 F.2d 212 (7 Cir. 1950) the court said:

"If the quotation ('rare cases' presenting 'exceptional circumstances of peculiar urgency') states a rule, it is not applicable here where there has been an exhaustion of state remedies."

Appellee quotes on page 22 of his brief from a note in 61 Harvard Law Review 668. But he has misread

the author's intention. In the same note on page 673 we read:

"And if state habeas corpus proceedings, usually including attempted certiorari, have been exhausted without success, federal habeas corpus may be invoked to bring the problem directly to the attention of the federal courts."

The suggestion that *corom nobis* ought to be tried shows a lack of knowledge of local practice. In 1947 the Washington legislature provided a corrective process to meet the Supreme Court's requirements. It was an amendment to the *habeas corpus* statute, and permits a review where it is alleged that federal constitutional rights have been violated. Sec. 1075, Rem. Rev. Stat. Prior to the amendment no inquiry would be permitted where the judgment was "regular and fair on its face." *In re Grieve*, 22 Wn.2d 902, 158 P.2d 73. Since the enactment of the 1947 statute the proper remedy in a case like this has been *habeas corpus*.

The last case involving *corom nobis* (and they were rare before that) is *State v. Williams*, 30 Wn.2d 18, 190 P.2d 734. It was commenced before the 1947 statute. The writ was denied but the Chief Justice in a separate concurring opinion remarked:

"\* \* \* I wish to point out that the writ of *corom nobis* has never been held to lie in this state."

It is proper to point out here that the Supreme Court relies upon the district judge in matters of local practice. See the opinion of Mr. Justice Frankfurter in *Darr v. Burford*, 339 U.S. at 230-231. His consid-

eration of the case and allowance of this appeal are sufficient warrant that no further state remedies are available.

**B. This proceeding is a proper resort to federal habeas corpus.**

Notwithstanding he quotes the Act of Congress, which expressly authorizes this application (p. 18), appellee argues that the petition for *habeas corpus* should not have been entertained. He bases his point on Judge Parker's dictum in 7 Fed. Rules Dec. 171-178. But he misconstrues the article. As pointed out above, the Washington court would not permit successive applications, and the assumption that successive applications may be made lies at the base of the learned jurist's reasoning.

Where the Supreme Court has had an application for certiorari before it and has denied it, and no other state remedy is available, the petitioner may proceed in the district court, otherwise he would be left remediless. For rights arising under the Constitution of the United States are a matter of Federal law, although they are equally enforceable in the state courts.

No jurisdictional problem is involved. Congress has expressly conferred jurisdiction where state remedies have been exhausted, or where resort to state remedies has failed to vindicate the federal right claimed.

The recent decision in *Darr v. Burford*, 339 U.S. 200, affirms these principles; a few quotations will suffice. The majority said:

"Even after this court has declined to review

a state judgment denying relief, *other federal courts have power to act on a new application by the prisoner.*" (p. 215) (*Italics supplied*)

"Even if the District Court may disregard our denial of certiorari, the fact that power to overturn state criminal administration *must not be limited to this court alone* does not make it less desirable to give this court an opportunity to perform its duty of passing upon charges of state violations of federal constitutional rights." (p. 216) (*Italics supplied*)

The minority, of course, felt that no consideration whatever should be given to the denial of certiorari. And evidently with Judge Parker's discussion in mind, they said:

"Nor would it be more respectful to the dignity of a State court for the District Court to disagree with the State court's view of federal law if such disagreement came after the court had denied certiorari rather than before." (p. 228)

In another place they said: :

"If the petition (for certiorari) is granted and the state's view of his federal claim is sustained here, he may still sue out a writ in the District Court." (p. 224)

Resort has been had to state process but contentions concerning the confession have been ignored. No one questions the competency of the state courts to pass upon constitutional questions. But when a prisoner says that his rights under the Constitution have been disregarded and his liberty has been taken, it is not improper for him to appeal to the national government, and to the judges who serve thereunder

and who are especially charged to vindicate such rights, and ask to be heard. Respectful attention will be given to the state court's judgments, but they will not be allowed to control.

## II.

### **The Trial of Richard Hein Was Tainted by Perjury Deliberately Contrived by the Prosecuting Officials.**

**A. The affidavit of Joe Jensen of August 4, 1949, was disregarded by the district judge, and it should not be considered on this appeal.**

In two places in their brief counsel for appellee mention this affidavit, and ask this court to find there was no perjury at the trial of Richard Hein. On page 16 they say Jensen's subsequent affidavit admits he told the truth at the trial and not at the state *habeas corpus* hearing. Again, on page 27, they say that the affidavit found in the mandamus proceeding on file herein shows that he told the truth at the trial, and they refer to Judge Driver's letter to counsel.

This affidavit was obtained by the deputy prosecuting attorney who is assisting in this appeal, from this 17-year-old boy while in custody (See affidavits (R. 539-543) which are not controverted). It was never brought before any court. It was impossible for appellant to meet it in the district court because the whereabouts of Jensen were then unknown. For this reason his affidavit was not admissible evidence under 28 U.S.C.A., Sec. 2246. *Walker v. Johnston*, 312 U.S. 275, 286. When these facts were called to the attention of the district judge he said he would dis-

regard Jensen's affidavit so far as making any finding on the issues was concerned (R. 519). No finding was made concerning it.

Joe Jensen, apparently in mortal fear of his captors, told a story on the witness stand that convicted Richard Hein. The testimony was skillfully contrived, *e.g.*: the question which elicited the damaging testimony was whether the witness had a conversation with Richard "around" November 17, 1947. (The body was discovered the 18th.) Sitting under the protection of the court in the state *habeas corpus* hearing, he told the truth. As soon as the case was over, the authorities picked him up again, pretending he was a vagrant. Again placed in fear, it appears he might have signed a statement prepared by them, recanting his sworn testimony. This statement, with the supposed verification of the deputy prosecuting attorney who is assisting in this case, was never brought to the attention of trial judge, and was never a part of the record. In fact, it has never been subjected to judicial scrutiny (R. 541). It is not proper to ask this court to consider it for the first time.

### III.

#### **Guilt or Innocence of the Accused**

##### **A. There was no evidence to convict petitioner's son.**

Appellee argues (p. 31) that the jury verdict forecloses the question of guilt or innocence. Ordinarily, guilt or innocence is no concern of the court in the consideration of a *habeas corpus* application. *Moore v. Dempsey*, 261 U.S. 86, 88. But the conviction here

rests upon the proposition that he confessed; and in resolving that point we are entitled to take into account all the circumstances, including his state of mind generated by his acts. And if corroboration is required—and it seems under all the authorities that it is, *Warsower v. United States*, 312 U.S. 342—the evidence outside the confession should be taken into account.

The possession of money is the only circumstance which appellee can point to with confidence. The boy explained how he got the money; he said Oscar Magnuson gave it to him (R. 279). Magnuson denied this (R. 279-310). But Magnuson had been arrested and held in jail for this crime (R. 311-314). And he appeared to be a police character (R. 307), and thoroughly unreliable. See R. 105.

It is going pretty far to say that a boy should be convicted of murder because we are not satisfied with his explanation of how he got a sum of money. The imputation of perjury is to be avoided. Moore on Facts (1908) Vol. 1, p. 185, Sec. 138. Improbability is sometimes a badge of veracity. *Idem*, Vol. II, p. 1199, Sec. 1061. A liar would not invent an improbable sounding story—or one almost certain to be contradicted—when one more inherently reasonable would serve his purpose. *Graham v. Graham*, 50 N.J. Eq. 701, 25 Atl. 358.

When Joseph's brethren returned to their father and told him that Joseph was yet alive and governor over all the land of Egypt, "Jacob's heart fainted, for he believed them not." Gen. 46:26.



The suspicious mind can find evidence of guilt in every innocent act and gesture. When the officers set out to prove that the so-called confession was real they were able to build a case—what the prosecutor termed a “*prima facie*” case (R. 469). Children, with their love of the marvellous, their awe of authority coupled with a desire to be helpful, and their amenability to suggestion, formed ready instruments for the official designs. Inez Pitzer’s story that the boy told her about the murder before it appeared in the paper is thus accounted for. This actually happened on Wednesday, as the boy testified (R. 262).

Appellee says that some of the points argued in the opening brief are urged for the first time on this appeal. This is not correct. The question of a fair trial—which, after all, is the important thing in any case of this kind: *Adamson v. California*, 332 U.S. 46—was before the state court and the district judge; and all questions relating to it were involved, and were argued.

### CONCLUSION

The judgment of the district court should be reversed with directions to grant the writ.

Respectfully submitted,

JAMES TYNAN,

*Attorney for Appellant.*



No. 13029

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United States  
Court of Appeals  
For the Ninth Circuit.

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DALE B. WINTERSTEEN,

Appellant,

vs.

HARRY SEMLER,

Appellee.

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Transcript of Record

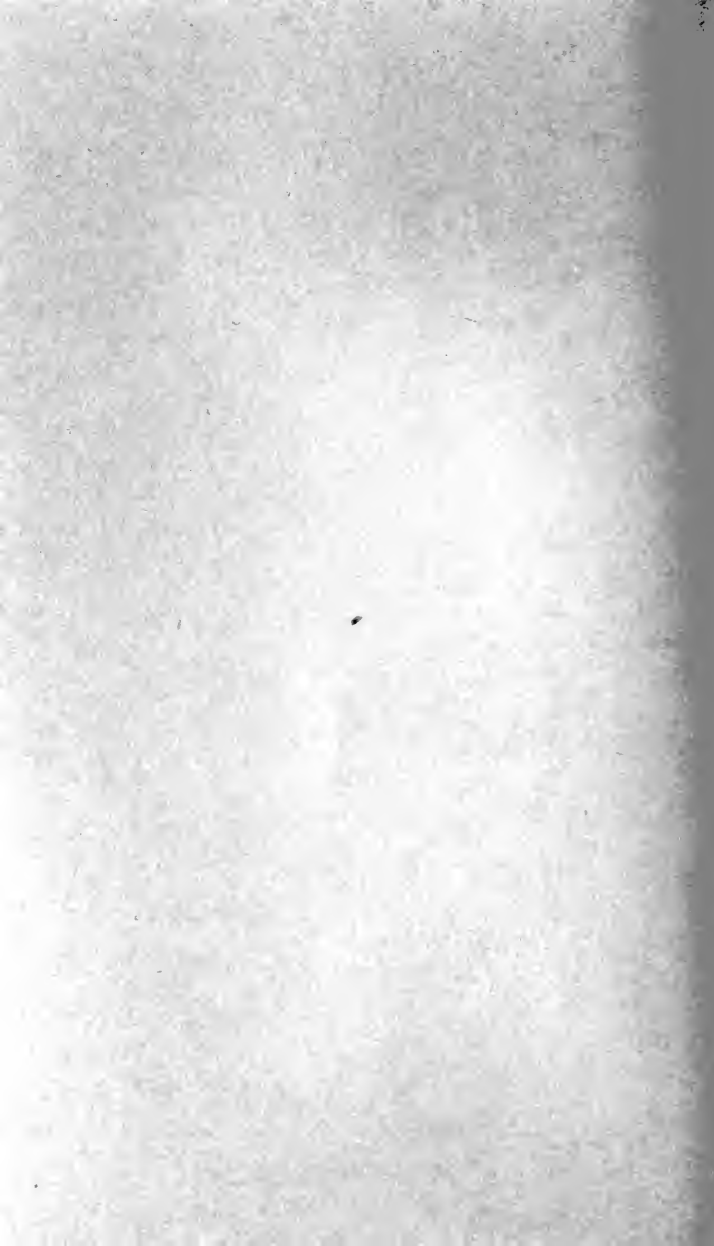
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Appeal from the United States District Court,  
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PAUL P. O'BRIEN



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

KRAUSE, EVANS & KORN,

GUNTHER F. KRAUSE,

Spalding Building,  
Portland, Oregon.

IRVING KORN,

Equitable Building,  
Portland, Oregon.

ELAM AMSTUTZ,

Weatherly Building,  
Portland, Oregon.

Attorneys for Appellant.

NORMAN L. EASLEY, and

GRIFFITH, PHILLIPS & COUGHLIN,

Electric Building,  
Portland, Oregon.

LLOYD M. McCORMICK,

Failing Building,  
Portland, Oregon.

Attorneys for Appellees.



In the United States District Court  
for the District of Oregon

No. Civil 5715

DALE B. WINTERSTEEN,

Plaintiff,

vs.

HARRY SEMLER and JOSEPH T. BURTON,  
Defendants.

SECOND AMENDED COMPLAINT

Comes now the plaintiff and leave of court having first been obtained, files this his second amended complaint and for cause of action against the defendants, and each of them, complains and alleges:

I.

Plaintiff is a citizen of the State of Washington and defendants are citizens of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

For several years prior hereto and at all times herein involved plaintiff and Gladys Wintersteen have been and now are husband and wife.

III.

During all times herein mentioned defendants were and now are duly licensed dentists practicing their profession, among other places, in the City of Portland, County of Multnomah and State of

Oregon. During all times herein mentioned defendant Joseph T. Burton was employed in his said professional capacity by defendant Harry Semler who conducts and has under his control, among other places, dental offices in the Alisky Building, Portland, Oregon. Plaintiff is informed and believes and therefore alleges that for more than nine months after the accrual of this cause of action defendant Joseph T. Burton resided out of the State of Oregon.

#### IV.

Said defendant Harry Semler represented to the public at large and to plaintiff's wife, Gladys Wintersteen, in particular, that he and other dentists under his employ were licensed dentists and qualified, competent and skilful in the performance of professional dentistry and particularly in the extraction of teeth. Relying upon said representations, plaintiff's said wife called at said Harry Semler's dental offices in the Alisky Building at Portland, Oregon, on or about the 8th day of July, 1948, and consulted with defendants with reference to the examination and extraction of her teeth, and thereupon, for a consideration, plaintiff's said wife employed and engaged the services of defendants in their professional capacities as dental extractionists and surgeons, in connection with the examination and extraction of such of the teeth of plaintiff's wife as might be necessary to extract.

#### V.

Pursuant to the advice, representations and

directions of said defendants, and relying thereon, plaintiff's said wife returned to the said dental offices of defendants on or about the 10th day of July, 1948, and thereupon at said time and place and pursuant to the advice and direction of defendants and in preparation for said extractions, plaintiff's said wife was administered a general anesthetic by defendants, as a result of which plaintiff's said wife was rendered entirely unconscious.

## VI.

While plaintiff's said wife was entirely unconscious, being under the effects of said general anesthetic, said defendants did then and there extract seventeen teeth and remove the same from the mouth of plaintiff's wife. At said time and place and at all times while plaintiff's said wife was a patient of defendants and under their exclusive care, attention and control, said defendants negligently, carelessly and recklessly allowed foreign substances to pass down the throat of plaintiff's wife, which thereupon passed through her trachea and into her right lung, causing plaintiff's wife to sustain great physical pain and mental anguish, hereinafter more fully described.

## VII.

The teeth of plaintiff's said wife extracted by defendants were diseased with pyorrhea and had large deposits of tartar lodged on, around and between them. Defendants were aware of said conditions.

## VIII.

On or about the 19th day of July, 1948, and at the request and instruction of defendants, plaintiff's said wife returned to the dental offices of said defendants to have the stitches removed from the gums of her mouth. At said time and place plaintiff's said wife advised defendants that she was having repeated and violent coughing spells, that during said time she was discharging from her mouth a foul greenish, bile-like substance, that she was unable to sleep at night because of said coughing spells and the discharging of said substance, that she was unable to keep food on her stomach except milk and anacin, that she felt in a generally weakened physical condition, in reply to which complaints defendants failed, refused and neglected either to secure for plaintiff's said wife or to advise her to secure for herself or to render unto her any medical or any other kind of aid or assistance or counsel. At said time and place said defendants led her to believe that her symptoms, pains and sufferings complained of as aforesaid were commonly associated with the after-effects of extractions. At said time and place said defendants further advised her that there were no further dental or medical services to be rendered her except the removal of said stitches from her gums and the making and fitting of a permanent set of dentures for her.

## IX.

The injuries sustained by plaintiff's wife, as hereinabove and hereinafter set forth, were directly

and proximately caused by the carelessness, recklessness and negligence of the defendants in that:

1. Defendants failed to take the necessary and reasonable precautions immediately after the extraction of her teeth to avoid foreign substances entering and passing down her throat and trachea.

2. Defendants failed, refused and neglected to secure any medical or dental or any other kind of post operative assistance or aid or counsel for her after being advised of her complaints, pains and symptoms as aforealleged.

3. On or about July 19, 1948, plaintiff's said wife advised defendants that she was having repeated and violent coughing spells, that during said time she was discharging from her mouth a foul, greenish bile-like substance, that she was unable to sleep at night because of said coughing spells and the discharging of said substance, that she was unable to keep food on her stomach except milk and anacin, and that she felt in a generally weakened physical condition, at which time defendants negligently led plaintiff's said wife to believe that her symptoms, pain and suffering complained of **as aforesaid were commonly** associated with the after-effects of extractions.

## X.

As a direct and proximate result of the carelessness, recklessness and negligence of said defendants, plaintiff's wife, Gladys Wintersteen, within a period of approximately three or four days after the ex-

traction of her teeth, as aforesaid, began suffering from an upset stomach, was unable to retain anything except anacin and milk, began to suffer from severe and repeated coughing spells, and in connection therewith coughed up a foul, greenish, bile-like substance, was unable to sleep at night because of said coughing spells and the discharging of said substance, began to lose weight, and found herself in a generally weakened physical condition and in a highly nervous condition. Thereafter her said condition worsened and in addition thereto she began to suffer from aches and pains in the right side of her back. As a result thereof, plaintiff's wife, Gladys Wintersteen, required medical attention, care and treatment with the result that she had to be hospitalized and submit to bronchoscopies for the purpose of removing pus and poison from her right lung. Thereafter the condition of said lung worsened with the result that she had to be hospitalized again for further medical treatment, and in connection therewith she was required to undergo a surgical operation for the removal of an abscess in the upper region of her right lung. In connection with said operation it was necessary to remove a part of her rib in the back of her right side. Thereafter she was required to carry a tube on the right side of her back so as to allow poisonous drainage from said right lung to empty outside of her body and unto and into cotton paddings. After said operation she required further hospitalization and it was necessary for her doctors to perform a second surgical



operation and to remove another abscess in the lower portion of her said right lung. In connection with said operation it was necessary to remove parts of four of her ribs on the right side of her back. Thereafter and as a result of this operation, she was required to carry and still does carry a second tube in her back so as to allow poisonous drainage from said right lung to empty outside of her body unto and into cotton paddings. As a direct and proximate result of defendants' negligence resulting in her injuries aforesaid, she has suffered and now suffers great physical pain and mental anguish, she is unable to lie or rest or otherwise allow pressure on her back. As a further direct and proximate result of defendants' negligence, she will suffer permanent injuries to her said right lung, she will be permanently left in a generally weakened physical condition, and she will be permanently disabled from carrying on and doing the regular and normal duties of a housewife and she will continue to suffer great physical pain and mental anguish.

## XI.

At the time of the extraction of said teeth, plaintiff's wife, Gladys Wintersteen, was a strong, able-bodied woman, enjoyed good health, and was capable of performing physical work and all of the duties of the maintenance of plaintiff's home. At said time she was several months past 44 years of age with a life expectancy of 25.27 years. By reason of the injuries sustained, plaintiff's wife has been to the

date of this second amended complaint and will be permanently disabled from performing many of the substantial duties of her household and will require assistance and aid from plaintiff.

## XII.

By reason of the premises plaintiff has been deprived of the services, society, comfort and companionship of his wife. The ability of plaintiff's wife to render services and assistance to plaintiff has been substantially impaired and will be so for the remainder of her life. By reason of the grave injuries to his wife, plaintiff has sustained great mental pain and suffering. As a proximate result of defendants' negligence aforescribed and by reason of the premises, plaintiff has suffered damages in the sum of \$25,452.33.

Wherefore, plaintiff prays judgment against the defendants for the sum of \$25,452.33, and for his costs and disbursements incurred herein.

KRAUSE, EVANS & KORN,

/s/ IRVING KORN,

/s/ ELAM AMSTUTZ,

Attorneys for Plaintiff.

[Endorsed]: Filed February 5, 1951.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Defendant Harry Semler moves the court as follows:

I.

To dismiss the action on the ground that it appears on the face of plaintiff's second amended complaint that his action has not been timely brought.

LLOYD M. McCORMICK, and  
GRIFFITH, PHILLIPS &  
COUGHLIN.

By /s/ NORMAN L. EASLEY,  
Attorneys for Defendant  
Harry Semler.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1951.

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[Title of District Court and Cause.]

AMENDED ANSWER

First Defense

The right of action set forth in the Second Amended Complaint did not accrue within two years next before the commencement of this action.

## Second Defense

Defendants admit Paragraphs I, II, and III; admit that defendant Harry Semler represented to the public that he and the other dentists under his employ were licensed, qualified and competent dentists, and admit that plaintiff's wife relied upon such representation when she consulted with defendants regarding personal dental problems on July 8, 1949; admit that after consultation, teeth of plaintiff's wife were extracted under a general anesthetic on July 10, 1948, in the dental offices of defendant Harry Semler; admit that the teeth of plaintiff's wife were diseased with pyorrhea and that this condition was known to defendant Harry Semler; and admit that on the 19th day of July, 1948, stitches were removed from the gums of plaintiff's wife's mouth. Defendants deny each and every allegation contained in the Second Amended Complaint.

Wherefore, having fully answered plaintiff's Second Amended Complaint, defendants pray that plaintiff take nothing thereby and that judgment be entered in favor of defendants.

LLOYD M. McCORMICK, and  
GRIFFITH, PHILLIPS &  
COUGHLIN,

By /s/ NORMAN L. EASLEY,  
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

### PRE-TRIAL ORDER

The above-entitled cause came on regularly for pre-trial conference before the undersigned Judge of the above-entitled court on the 16th day of April, 1951; plaintiff appeared in person and by Irving Korn, one of his attorneys; defendants appeared in person and by Norman L. Easley, one of their attorneys.

The parties, with the approval of the court, submit the following:

#### Agreed Statement of Facts

##### I.

That plaintiff is a citizen, resident and inhabitant of the State of Washington, and each defendant is a citizen, resident and inhabitant of the State of Oregon; that the amount in controversy herein, exclusive of interest and costs, exceeds the sum of \$3,000.00, and that the above-entitled court has jurisdiction of the cause.

That plaintiff and Gladys Wintersteen at all times involved herein were and now are husband and wife; that defendants were and now are duly licensed dentists practicing their profession in the City of Portland, Oregon; that at all times pertinent herein, defendant Joseph T. Burton was employed in his professional capacity by defendant Harry Semler, who conducts and has under his control dental offices in the Alisky Building, Portland, Oregon, and who represented to the public and

particularly to plaintiff's wife that he and other dentists under his employ were licensed dentists and qualified, competent and skillful in the performance of professional dentistry; that plaintiff's wife relied upon such representations and consulted with defendant Harry Semler's employees regarding personal dental problems on July 8, 1948; that thereupon plaintiff's wife, Gladys Wintersteen, employed and engaged the services of defendants to extract her teeth; pursuant to defendant Harry Semler's directions, plaintiff's wife returned to defendant Harry Semler's dental offices on July 10, 1948 and at said time and place she was administered a general anesthetic by defendants, after which defendants did then and there extract and remove seventeen teeth; that at the time of the extractions, plaintiff's wife had pyorrhea; that thereafter on July 19, 1948, at the request and instruction of defendants, plaintiff's wife returned to the dental offices of defendant Harry Semler and stitches were removed from her gums; that at said time plaintiff's wife was 44 years of age, with a life expectancy of 25.27 years; that this action was filed on August 9, 1950; that continuously between September 1, 1949 and September 1, 1950, defendant Joseph T. Burton was physically present in Philadelphia, Pennsylvania, where he attended the University of Pennsylvania, and that at all other times pertinent herein defendant Joseph T. Burton was physically present in the State of Oregon; and that defendant Harry Semler has been a resident of and present in the State of Oregon continuously since July 8, 1948.

### Plaintiff's Contentions Denied By Defendants

Plaintiff contends that the defendants were guilty of negligence constituting the sole and proximate cause of injuries to plaintiff's wife in the following particulars:

1. Defendants failed to take the necessary and reasonable precautions immediately after the extraction of her teeth to avoid foreign substances entering and passing down her throat and trachea;

2. Defendants failed, refused and neglected to secure any medical or dental or any other kind of post operative assistance or aid or counsel for her after being advised of her complaints, pains and symptoms;

3. On or about July 19, 1948, plaintiff's said wife advised defendants that she was having repeated and violent coughing spells, that during said time she was discharging from her mouth a foul, greenish, bile-like substance, that she was unable to sleep at night because of said coughing spells and the discharging of said substance, that she was unable to keep food on her stomach except milk and anacin, and that she felt in a generally weakened physical condition, at which time defendants negligently led plaintiff's said wife to believe that her symptoms, pain and suffering complained of as aforesaid were commonly associated with the after-effects of extractions.

Plaintiff contends that for some time prior to and at the time of said extractions his wife's teeth had

deposits of tartar lodged on, around and between them; and that during said operation and immediately thereafter, she was under the exclusive care, attention and control of defendants.

Plaintiff further contends that as a direct and proximate result of the carelessness, recklessness and negligence of said defendants, his wife acquired lung abscesses resulting in permanent physical disablement by reason of which plaintiff has been deprived of her services, society, comfort and companionship.

\* \* \*

Defendants deny the foregoing contentions.

\* \* \*

#### Defendants' Contentions Denied By Plaintiff

Defendants contend that plaintiff's action did not accrue within two years next before the commencement thereof and is, therefore, barred by the Statute of Limitations. Defendants further contend that this issue should be tried separately by the court as a matter of law.

Defendants contend that on July 10, 1948, defendant Joseph T. Burton was in immediate control of plaintiff's wife only during the time she was in the surgery room and that during the time plaintiff's wife was in the recovery room after her extractions, she was under the over-all control of defendant Harry Semler.

\* \* \*

Plaintiff denies the foregoing contentions.

\* \* \*



Issues to Be Determined

I.

Is plaintiff's cause of action barred by the Statute of Limitations as to either or both defendants?

II.

Should the foregoing issue as to the applicability of the Statute of Limitations be tried separately by the court as a matter of law?

III.

Was plaintiff's wife under the exclusive care, attention and control of defendants, or either of them, while she was in the surgery room?

IV.

Was plaintiff's wife under the exclusive care, attention and control of defendants, or either of them, while she was in the recovery room?

V.

Were the defendants, or either of them, guilty of negligence in any particular as charged against them and, if so, was such negligence the proximate cause of injuries, if any, suffered by plaintiff's wife?

VI.

What damages, if any, has plaintiff sustained by reason of the premises?

\* \* \*

### Physical Exhibits

Certain physical exhibits have been identified and received as pre-trial exhibits, the parties agreeing with the approval of the court that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the ground of relevancy, competency and materiality. Plaintiff waives objection to the admissibility in evidence of each deposition marked as an exhibit. Defendants have notified plaintiff in writing of evidence which will be objected to and contained in said depositions.

### Plaintiff's Exhibits

1. X-Ray Film (1-A through 1-H).
2. Statement of Dr. Bildstein dated November 15, 1948.
3. Receipt from Drs. Butler, et al., dated October 11, 1948.
4. Statement of Dr. Ben Wade dated November 1, 1948.
5. Statement of Physicians Medical Laboratory dated November 30, 1948.
6. Statement of Dr. Poppe dated September 9, 1948.
7. Statement of St. Vincent's Hospital dated September 9, 1948.
8. Statement of Portland X-Ray Laboratory.

9. Statement of Dr. Tuhy.
10. Matson Memorial Hospital bill.
11. Dr. Semler's original record card.
12. Deposition of Dr. Joseph T. Burton.
13. Deposition of Samuel S. Ritchie.
14. Deposition of Alice Benson.
15. Deposition of Jane Schamel.
16. Deposition of Madge Magner.
17. Deposition of Harry Semler.

#### Defendants' Exhibits

18. Transcript of Testimony, Gladys Wintersteen v. Harry Semler.
19. Deposition of Dale Wintersteen.
20. Deposition of Gladys Wintersteen.
21. Photostatic copy of letter from Dr. Tuhy to Paul Harris.
22. Photostatic copy of excerpts from St. Vincent's Hospital records on Gladys Wintersteen.
23. Photostatic copy of record card.

#### Jury Trial

Plaintiff made timely demands for trial by jury.

The parties hereto agree to the foregoing pre-trial order and the court being fully advised in the premises;

Now Orders that the foregoing pre-trial order shall not be amended except by consent of both parties, or to prevent manifest injustice; and

It Is Further Ordered that the pre-trial order supersedes all pleadings; and

It Is Further Ordered that upon trial of this case, no proof shall be required as to the matters of fact hereinabove specifically found to be admitted, but proof upon the issues of fact and law between plaintiff and defendants as hereinabove stated shall be had.

Dated at Portland, Oregon, as of the 25th day of May, 1951.

/s/ CLAUDE McCOLLOCH,  
Judge.

Approved:

/s/ IRVING KORN,  
Of Attorneys for Plaintiff.

/s/ NORMAN L. EASLEY,  
Of Attorneys for Defendants.

[Endorsed]: Filed May 31, 1951.

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[Title of District Court and Cause.]

### ORDER

This matter came on for hearing before the undersigned, Judge of the above-entitled court, on May 25, 1951, on defendant Harry Semler's Motion for Summary Judgment; plaintiff appearing by his

attorneys, Krause, Evans & Korn, by Irving Korn; defendants appearing by their attorneys, Griffith, Phillips & Coughlin, by Norman L. Easley; arguments were heard, and the court being fully advised,

It Is Hereby Considered, Ordered and Adjudged that defendant Harry Semler's Motion for Summary Judgment be, and it hereby is, allowed, and that plaintiff's cause of action against defendant Harry Semler be, and it hereby is, dismissed.

Dated at Portland, Oregon, this 25th day of May, 1951.

/s/ CLAUDE McCOLLOCH  
Judge.

[Endorsed]: Filed May 28, 1951.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To Harry Semler and Lloyd M. McCormick,  
Norman L. Easley and Griffith, Phillips and  
Coughlin, your Attorneys

Notice is hereby given that Dale B. Wintersteen, Plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order allowing Defendant Harry Semler's motion for summary judgment and dismissing the cause herein against said Defendant Harry Semler, said

order having been entered in the above-entitled action on the 25th day of May, 1951.

Dated at Portland, Oregon, this 21st day of June, 1951.

KRAUSE, EVANS & KORN,  
/s/ GUNTHER F. KRAUSE,  
/s/ ELAM AMSTUTZ,  
/s/ IRVING KORN,  
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1951.

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[Title of District Court and Cause.]

### BOND ON APPEAL

To Harry Semler and Lloyd M. McCormick,  
Norman L. Easley and Griffith, Phillips and  
Coughlin, your Attorneys

Whereas, lately in the United States District Court of the District of Oregon in a cause pending in said Court between Dale B. Wintersteen, Plaintiff, and Harry Semler and Joseph T. Burton, Defendants, an order was made and entered allowing Defendant Harry Semler's motion for summary judgment and dismissing the cause herein against said Defendant Harry Semler, and the said Dale B. Wintersteen having filed in said Court a notice of appeal to reverse the said order in the said

cause in which, notice was given that appeal was taken to the United States Court of Appeals for the Ninth Circuit,

Now, Therefore, we, Dale B. Wintersteen, the above-named, as principal, and Standard Accident Insurance Company, a Michigan Corporation as Surety, are held and firmly bound unto said Harry Semler, in the sum of \$250.00, the said bond being conditioned to secure the payment of said Harry Semler's costs of the Plaintiff's appeal is dismissed or the order affirmed, or such costs as the said United States Court of Appeals for the Ninth Circuit may award if the said order is modified.

Sealed with our seals and dated this 21st day of June, 1951.

/s/ DALE B. WINTERSTEEN,

[Seal]                      STANDARD ACCIDENT  
                                 INSURANCE COMPANY,

/s/ J. NIAIRD,

Surety,

Attorney-in-fact.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1951.

[Title of District Court and Cause.]

PLAINTIFF'S STATEMENT OF POINTS TO  
BE RELIED UPON ON APPEAL

To Harry Semler and Lloyd M. McCormick, Norman L. Easley, and Griffith, Phillips and Coughlin, your Attorneys:

Dale B. Wintersteen, Plaintiff above named and Appellant in the above-entitled action to the United States Court of Appeals of the Ninth Circuit, intends upon his appeal to rely upon the following points:

I.

The Court erred in entering its order allowing Defendant Harry Semler's motion for summary judgment and adjudging that Plaintiff's cause of action against Defendant Harry Semler be dismissed on the ground that the same was barred by reason of the Plaintiff's failure to commence his action within Two (2) years after the date of the accrual thereof.

Dated at Portland, Oregon, this 21st day of June, 1951.

KRAUSE, EVANS & KORN,

/s/ GUNTHER F. KRAUSE,

/s/ ELAM AMSTUTZ,

/s/ IRVING KORN,

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1951.



[Title of District Court and Cause.]

PLAINTIFF'S DESIGNATION OF CONTENTS  
OF RECORD ON APPEAL

To Harry Semler and Lloyd M. McCormick, Norman L. Easley, and Griffith, Phillips and Coughlin, your Attorneys:

Dale B. Wintersteen, Plaintiff above named and Appellant in the above-entitled action to the United States Court of Appeals of the Ninth Circuit, hereby designates the following portions of the records and proceedings in this cause to be contained in the record on appeal:

Plaintiff's second amended complaint.

Defendant Harry Semler's motion for summary judgment filed against the second amended complaint.

The amended answer to Plaintiff's second amended complaint.

The pre-trial order.

Plaintiff's notice of appeal and bond on appeal.

This designation.

Plaintiff's statement of points to be relied on at the appeal.

Dated at Portland, Oregon, this 21st day of June, 1951.

KRAUSE, EVANS & KORN,  
/s/ GUNTHER F. KRAUSE,  
/s/ ELAM AMSTUTZ,  
/s/ IRVING KORN,

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1951.

[Title of District Court and Cause.]

### DOCKET ENTRIES

1950

Aug. 9—Filed complaint.

Aug. 9—Issued summons to marshal.

Aug. 11—Filed summons with marshal's return.

Aug. 14—Filed amended complaint.

Aug. 14—Filed praecipe for issuance of summons  
on 1st amended complaint.

Aug. 14—Issued summons on 1st amended com-  
plaint—to marshal.

Aug. 23—Filed praecipe for issuance of summons  
on 1st amended complaint on Harry Sem-  
ler.

Aug. 23—Issued summons on 1st amended com-  
plaint for Harry Semler—to marshal.

Aug. 24—Filed 2 summons with returns on 1st  
amended complaint.

Sept. 5—Filed motion of deft. for summary judg-  
ment.

Sept. 5—Filed affidavit of mailing.

Oct. 26—Filed notice of plntf. to take depositions  
of Dr. Joseph T. Burton, et al.

Oct. 26—Issued 7 subpoenas—to marshal.

Oct. 27—Filed motion for order for subpoena duces  
tecum.

Oct. 27—Record of hearing on above motion and  
order taking under advisement.

Oct. 27—Filed notice of request for hearing on  
motion for summary judgment.

Oct. 30—Filed 7 subpoenas with returns.

1950

- Oct. 30—Entered order setting hearing on motion for summary judgment on Nov. 13, 1950, at 10 a.m.
- Nov. 2—Filed and entered order for issuance of subpoena duces tecum.
- Nov. 2—Issued subpoena duces tecum—to marshal.
- Nov. 13—Record of hearing on deft's motion for summary judgment and order taking under advisement.
- Nov. 9—Filed subpoena with return.
- Dec. 5—Filed deposition of Joseph T. Burton.
- Dec. 8—Filed deposition of Dale B. Wintersteen.

1951

- Jan. 31—Filed application for leave to file second amended complaint.
- Feb. 5—Filed and entered order granting leave to file 2nd amended complaint.
- Feb. 5—Filed 2nd amended complaint.
- Feb. 5—Filed praecipe for issuance of summons on 2nd amended complaint.
- Feb. 5—Issued summons on 2nd amended complaint to marshal.
- Feb. 5—Entered order reserving motion for summary judgment to time of pre-trial conference.
- Feb. 5—Entered order setting for pre-trial conference on Feb. 26, 1951.
- Feb. 12—Filed summons with return.
- Feb. 17—Entered order resetting for pre-trial conference March 5, 1951.

1951

Feb. 26—Filed answer of Deft. Joseph T. Burton to plff's second amended complaint.

Feb. 26—Filed motion for summary judgment.

Mar. 5—Filed pltf's demand for jury trial.

Mar. 5—Record of pre-trial conference, entered order denying motion for summary judgment and order setting for further pre-trial conference April 16, 1951.

Apr. 16—Filed amended answer.

Apr. 16—Filed motion for leave to file amended answer.

Apr. 16—Filed stipulation for leave to file amended answer.

Apr. 16—Filed and entered order to file amended answer.

Apr. 16—Record of pre-trial conference and order continuing to April 23, 1951.

Apr. 30—Record of submission of pre-trial order, entered order setting for trial May 30, 1951.

May 3—Issued subpoena—4 copies—to Atty. Korn, Equitable Bldg.

May 4—Entered order resetting for trial on May 31, 1951.

May 22—Filed subpoena with return.

May 25—Record of hearing on motions of defts. for summary judgment; argued and order allowing motion of Harry Semler and reserving motion as to Deft. Joseph T. Burton.

1951

May 28—Filed order allowing motion for summary judgment as to Deft. Semler.

May 25—Entered pre-trial order (as of May 25, 1951).

May 31—Filed pre-trial order.

June 7—Filed motion of plntf. to amend judgment.

June 11—Entered order allowing motion for summary judgment as to Deft. Harry Semler.

June 13—Entered order reserving to time of trial motion for summary judgment as to Deft. Burton.

June 21—Filed notice of appeal by Dale B. Wintersteen.

June 21—Filed bond on appeal.

June 21 —Filed plntf's statement of points.

June 21—Filed plntf's designation of record.

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### CERTIFICATE OF CLERK

United States of America,

District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents, consisting of Second Amended Complaint, Motion for Summary Judgment, Amended Answer, Pre-trial Order, Notice of Appeal, Bond on Appeal, Statement of Points, Designation of Record, and Transcript of Docket Entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5715, in which Dale B. Wintersteen

is plaintiff and appellant, and Harry Semler and Joseph T. Burton are defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 20th day of July, 1951.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy.

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[Endorsed]: No. 13029. United States Court of Appeals for the Ninth Circuit. Dale B. Wintersteen, Appellant, vs. Harry Semler, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed July 26, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

No. 13031

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**United States**  
**Court of Appeals**  
**For the Ninth Circuit.**

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SAM ZALL, an Individual Doing Business as Sam  
Zall Milling Company,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SAM ZALL, an Individual Doing Business as Sam  
Zall Milling Co.,

Respondent.

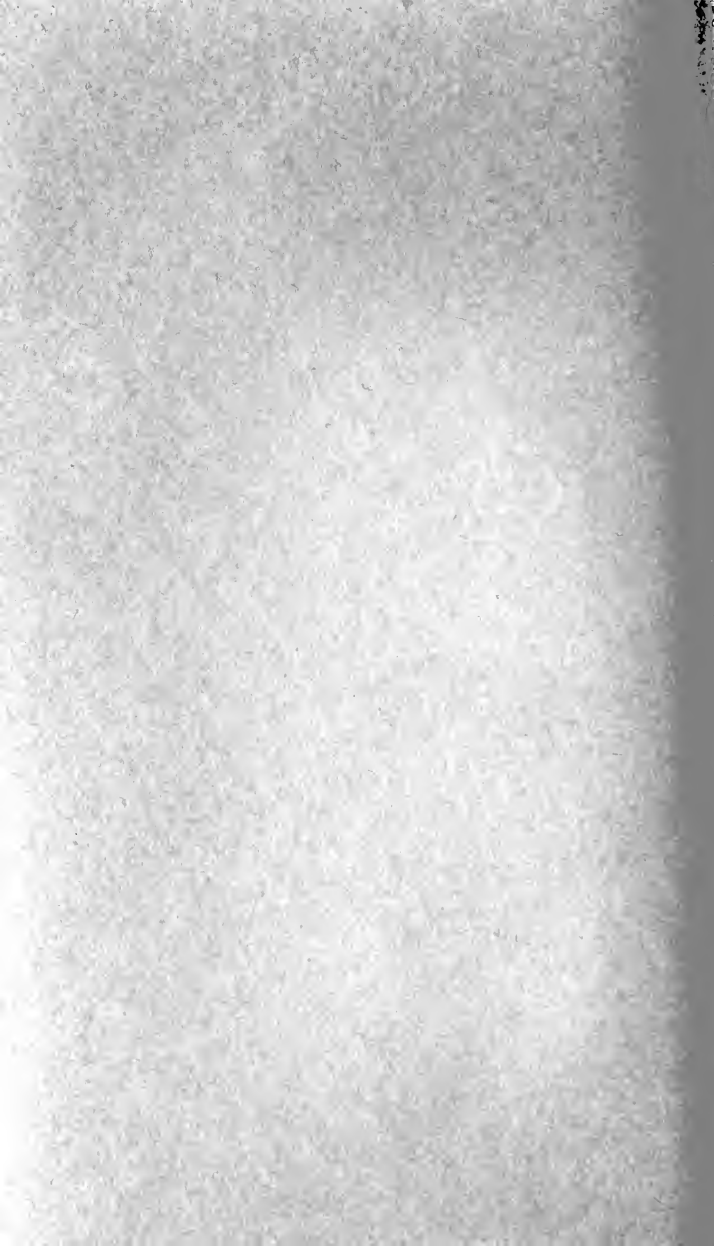
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**Transcript of Record**

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Upon Petition to Review and Petition for Enforcement  
of Order of the National Labor Relations Board

APR 28 1952





No. 13031

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United States  
Court of Appeals  
For the Ninth Circuit.

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SAM ZALL, an Individual Doing Business as Sam  
Zall Milling Company,  
Petitioner,  
vs.

NATIONAL LABOR RELATIONS BOARD,  
Respondent,  
and

NATIONAL LABOR RELATIONS BOARD,  
Petitioner,  
vs.

SAM ZALL, an Individual Doing Business as Sam  
Zall Milling Co.,  
Respondent.

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Transcript of Record

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Upon Petition to Review and Petition for Enforcement  
of Order of the National Labor Relations Board



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## APPEARANCES

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For Sam Zall Milling Co.

CECIL F. GAMBLE,

610 Santa Clara St.,  
Vallejo, Calif.,

For American Federation of Grain Millers.

BENJAMIN B. LAW,

821 Market St.,  
San Francisco, Calif.,

For the General Counsel.





United States of America Before the National Labor  
Relations Board, Twentieth Region

Case No. 20-CA-503

In the Matter of

SAM ZALL, an Individual Doing Business as SAM  
ZALL MILLING COMPANY,

and

AMERICAN FEDERATION OF GRAIN MILL-  
ERS INTERNATIONAL UNION, A.F.L.

### COMPLAINT

It having been charged by American Federation of Grain Millers International Union, A.F.L., that Sam Zall, an individual, doing business as Sam Zall Milling Company, has engaged in, and is now engaging in, certain unfair labor practices affecting commerce as set forth in the National Labor Relations Act, as amended, 29 U.S.C.A. 141, et seq. (Supp. July, 1947), herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the Rules and Regulations of the National Labor Relations Board, Series 5, as amended, Section 203.15, hereby issues this Complaint and alleges:

#### I.

Sam Zall, an individual, doing business as Sam Zall Milling Company, hereinafter called the Re-

spondent, is engaged at Marysville, California, in the production and sale of animal and poultry feeds. During 1949 the Respondent purchased grains, alfalfa, concentrates and other materials valued at more than \$250,000, of which, materials valued at more than \$90,000 were shipped directly to the Respondent's place of business in Marysville, California.

During 1949 the Respondent sold in California, poultry feeds valued at more than \$75,000 to Vantress Hatchery and Breeding Farms, a business enterprise, which used said feeds in the production of poultry and eggs at its farms near Marysville, California. During 1949 Vantress Hatchery and Breeding Farms sold and shipped from its farms near Marysville to points in the United States outside California, eggs and poultry valued at more than \$60,000.

During 1949 the Respondent sold, in California, animal and poultry feeds to livestock and poultry producers who collectively sell substantial amounts of livestock and poultry or livestock and poultry products to points in the United States outside California.

## II.

American Federation of Grain Millers International Union, A.F.L., herein called the Union, is a labor organization within the meaning of Section 2 (5) of the Act.

## III.

All of the Respondent's production and maintenance employees, including the truck driver, but

excluding supervisors, buyers, salesmen and office employees, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

#### IV.

By October 2, 1950, a majority of the employees in the appropriate unit set forth in paragraph III, above, had designated the Union as their representative for the purposes of collective bargaining with the Respondent, and at all times since October 2, 1950, the Union has been the representative for the purposes of collective bargaining of the majority of the employees in said unit and by virtue of Section 9 (a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining in regard to rates of pay, wages, hours of employment, and other conditions of employment.

#### V.

On October 3, 1950, and at all times thereafter up to and including the date hereof, the Respondent failed and refused, and continues to fail and refuse, to bargain collectively with the Union as the exclusive representative of all the employees in the appropriate unit above described in respect to rates of pay, wages, hours of employment, and other conditions of employment.

#### VI.

(a) On or about October 3, 1950, the Respond-

ent interrogated his employees about their union sympathies and activities.

(b) On or about October 6, 1950, the Respondent induced his employees within the appropriate unit described above to personally sign an agreement with him covering wages and working conditions.

(c) Within a few days after October 6, 1950, the Respondent granted to his employees pay increases and improved conditions of employment.

(d) The Respondent engaged in the acts and conduct set forth in sections (a), (b) and (c) of this paragraph, for the purpose of discouraging their continued membership in and activity on behalf of the Union.

## VII.

By his acts set forth in paragraphs V and VI, sections (b) and (c), above, the Respondent did engage in and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

## VIII.

By his acts set forth in paragraphs V and VI, sections (a), (b) and (c), above, the Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing, his employees in the exercise of their rights guaranteed them by Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

## IX.

The acts of the Respondent, set forth in paragraphs V and VI, sections (a), (b) and (c), above, occurring in connection with the operations of the Respondent described in paragraph I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the full flow of commerce.

## X.

The aforesaid acts of the Respondent, set forth in paragraphs V and VI, sections (a), (b) and (c), above, and each of them, constitute unfair labor practices within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 5th day of January, 1951, issues this, his Complaint against the Respondent herein.

[Seal]      /s/ GERALD A. BROWN,  
Regional Director, National Labor Relations Board,  
Twentieth Region.

[Admitted in evidence as General Counsel's Exhibit No. 1-E.]

Admitted January 30, 1951.

Before the National Labor Relations Board

[Title of Cause.]

### ANSWER OF SAM ZALL

Comes now Sam Zall and answering the complaint on file herein, admits, denies, alleges and avers as follows, to wit:

1. Lacks information on the subject sufficient to enable him to answer that portion of Paragraph I thereof, commencing with the words, "During 1949 Vantress Hatchery" and ending with the words, "outside California." and basing his denial on that ground denies each and every, all and singular, generally and specifically, the allegations therein.

2. Lacks information or belief upon the subject sufficient to enable him to answer the allegations contained in paragraphs II, III and IV of said complaint and basing his denial on that ground, denies each and every, all and singular, generally and specifically, the allegations therein contained.

3. Denies paragraph V, sub-paragraphs (a) and (b) and (d) of paragraph VI, paragraph VII, paragraph VIII, paragraph IX and paragraph X of said complaint and each and every, all and singular, generally and specifically, the allegations therein referred to.

4. Admits that within a few days after October 6, 1950, he granted to his employees pay increases but denies that he granted them improved conditions of employment.

Wherefore, it is prayed that the complaint on file herein be dismissed and that he go hence without more.

RICH, CARLIN & FUIDGE,  
Attorneys for Respondent,  
Sam Zall.

State of California,  
County of Yuba—ss.

Sam Zall, being first duly sworn, deposes and says:

That he is the Respondent in the above-entitled action; that he has read the within and foregoing Answer and knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated on his information or belief and as to those matters he believes it to be true.

/s/ SAM ZALL.

Subscribed and sworn to before me this 11th day of January, 1951.

/s/ EDITH FRANCISCOVICH,  
Notary Public in and for the County of Yuba, State  
of California.

Received January 16, 1951.

[Admitted in evidence as General Counsel's Exhibit No. 1-I.]

Before the National Labor Relations Board

[Title of Cause.]

Before: Maurice M. Miller,  
Trial Examiner.

### APPEARANCES

BENJAMIN B. LAW,  
For the General Counsel.

RICH, CARLIN & FUIDGE, by  
RICHARD H. FUIDGE,  
For the Respondent.

CECIL F. GAMBLE,  
For the Union.

### INTERMEDIATE REPORT AND RECOMMENDED ORDER

#### Statement of the Case

Upon a charge and amended charge duly filed by the American Federation of Grain Millers and International Union, affiliated with the American Federation of Labor and designated herein as the Union, the General Counsel of the National Labor Relations Board<sup>1</sup> in the name of the Board, caused the Regional Director of its Twentieth Region, at San

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<sup>1</sup>The General Counsel and his representative in this case are designated herein as the General Counsel, and the National Labor Relations Board as the Board.



Francisco, California, to issue a complaint dated January 5, 1951, against Sam Zall, an individual doing business in Marysville, California, as the Sam Zall Milling Co., herein called the Respondent. The complaint alleged that the Respondent engaged and has continued to engage in unfair labor practices affecting commerce, within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, as amended and re-enacted in the Labor Management Relations Act of 1947, 61 Stat. 136, designated herein as the Act. Copies of each charge, the complaint, and a notice of hearing were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleged, in substance: (1) that all of the Respondent's production and maintenance employees, including the truck driver, but exclusive of supervisors, buyers, salesmen and office employees, constitute a unit appropriate for the purposes of collective bargaining; (2) that a majority of the employees in the unit above defined had, by October 2, 1950, designated the Union as their representative for the purposes of a collective bargain with the Respondent, and that the Union, at all times since October 2, 1950—by virtue of Section 9 (a) of the Act—has been, and is now, entitled to act as the exclusive representative of the employees in the unit for the purpose of collective bargaining in regard to their rates of pay, wages, hours of employment, and other conditions of work; (3) that

the Respondent, on and after October 3, 1950, failed and refused, and continues to fail and refuse, to bargain collectively with the Union as the exclusive representative of the employees in the unit, with respect to their rates of pay, wages, hours of work and other conditions of employment; and (4) that the Respondent, (a) on or about October 3, 1950, interrogated his employees about their union sympathies and activities, (b) on or about October 6, 1950, induced employees within the unit to sign—personally—an agreement with him covering their wages and conditions of work, and (c) within a few days thereafter, granted them pay increases and improved conditions of work—all to discourage their continued membership in the Union and activity in its behalf.

In due course, on January 15, 1951, the Respondent filed an answer, in which he admitted certain jurisdictional allegations of the complaint, but denied others with respect to the interstate activity of his customers. The Respondent also challenged the complaint's allegation with respect to the status of the Union as a labor organization, and denied the commission of any unfair labor practice.

Pursuant to notice, a hearing was held at Marysville, California, on January 30, 1951, before me, a Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Respondent were represented by counsel, and the Union by a business representative. All of the parties participated in the case, and were afforded a full opportunity to be heard, to examine and cross-ex-

amine witnesses, and to introduce evidence pertinent to the issues. At the outset of his presentation, the General Counsel moved to amend the complaint in order to clarify one of its jurisdictional allegations. There was no objection; the motion was granted. A motion to amend the Respondent's answer was also granted. Certain stipulations with respect to the business activities of the Respondent and its principal customer were then noted for the record. At the close of the testimony, a motion on behalf of the General Counsel to conform the pleadings to the proof in certain immaterial matters was granted, without objection. Thereafter, counsel and the Trial Examiner engaged, informally, in a discussion of the issues in lieu of oral argument. The discussion has been made a part of the record. No one reserved the right to file a brief or proposed findings and conclusions, and no briefs have been received.

### Findings of Fact

Upon the entire record in the case, and from my observation of the witnesses, I make the following findings of fact:

#### I. The Business of the Respondent

Sam Zall, designated in this report as the Respondent, is an individual doing business as the Sam Zall Milling Co. at Marysville, California, where he is engaged in the production and sale of animal and poultry feeds. During 1949, he purchased grains, alfalfa, concentrates and other materials valued at more than \$250,000, of which materials valued at more than \$90,000 were shipped directly to his

place of business from points in the United States outside of the State of California. With respect to the materials shipped directly to the Respondent from points outside of California, it was stipulated that all of the material thus purchased was secured through brokers within the State of California under contracts with such brokers, and that payment for the material thus purchased was made to the brokers within the State.

In 1949, also, the Respondent sold, in California, poultry feeds valued at more than \$75,000 to the Vantress Hatchery and Breeding Farms, a business enterprise, which used these feeds in the production of poultry and eggs at its farm near Marysville. During 1949, the Vantress Hatchery and Breeding Farms sold and shipped to points in the United States outside of California, eggs and poultry valued at more than \$60,000. The record establishes, by stipulation, that I. K. Vantress, a member of the Vantress enterprise, would testify, if called, that feed purchased from the Respondent is fed only to its breeding stock, not to baby chicks; that the breeding stock is not shipped out of the State; and that its out-of-state shipments consist principally of hatching eggs. Shipments of chicks are rare and represent a "very minor percentage" of total shipments.

The total annual sales of the Respondent approximate \$500,000 in value; all of his sales are made in California, to purchasers within the State. The Vantress enterprise is his largest single customer. It was stipulated, and I find, that the figures with re-

spect to the business activities of the Respondent and Vantress Hatchery and Breeding Farms in 1950, if given, would be approximately the same as those for the previous year, noted.

The Respondent contends that his business relationships with the Vantress enterprise are insufficient to subject him to the Board's jurisdiction, on the ground that his own business activities are primarily local in character and do not involve the production of a commodity which, itself, moves in commerce, either in pure or processed form. At the most, it is argued, use of the Respondent's feed at the Vantress Farms may increase the productivity of its breeding stock, and thus make possible increased interstate shipments of the hatchery eggs which they in turn produce—but would produce, in some degree, even without the Respondent's feed.

I find no merit in the contention that the activities of the Respondent are not subject to the Board's jurisdiction. It is well established, now, that the jurisdiction conferred upon the Board by statute is co-extensive with the constitutional authority of Congress to legislate with respect to matters affecting interstate and foreign commerce. In determining the limits of this authority, the Supreme Court has declared that "the effect upon interstate and foreign commerce, not the source of the injury" determines the Board's jurisdiction.<sup>2</sup> In the present case, applying this test, I find no difficulty in reaching the conclusion that the Respondent is engaged in the manufacture of a product closely con-

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<sup>2</sup>Consolidated Edison Co. v. NLRB, 305 U. S. 197, 222.

nected with, and necessary to, the production of goods for commerce, and that unfair labor practices on the part of the Respondent might very well lead to labor disputes which would burden and obstruct commerce.

It has been judicially determined that employees who prepare fertilizer, or supply electricity and irrigation water, used in the production of agricultural commodities which move in commerce, perform operations necessary to the production of such goods for commerce. And the fact that, in this case, the Respondent's feed sustains and promotes the productivity of poultry stock which does not, itself, move in commerce but merely produces eggs which are the subject of interstate shipment, creates a situation clearly, but not materially, different. No substantial distinction, in my opinion, can be drawn between operations necessary to the production of finished goods for commerce and operations necessary to the production or maintenance of a "source" of goods for interstate shipment.<sup>3</sup> As the Supreme Court, in a case involving the Fair Labor Standards Act,<sup>4</sup> has declared:

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<sup>3</sup>Cf. *McComb v. Super-A Fertilizer Works, Inc.*, 165 F. 2d 824, in which an analogous question under the Fair Labor Standards Act, involving a manufacturer of chemical fertilizers, was decided. The Court held the statute applicable to the employees of the fertilizer manufacturer engaged in mixing the fertilizer, bagging it, and delivering it to trucks for transportation to farms, on the ground that their activity was "necessary to the production" of goods for commerce.

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<sup>4</sup>*Roland Electrical Co. v. Walling*, 326 U. S. 657, 663.

[the Act] does not require the employee to be employed even in the production of an article which itself becomes the subject of commerce or transportation among the several States. It is enough that the employee be employed, for example, in an occupation which is necessary to the production of a part of any other "articles or subjects of commerce of any character" which are produced for trade, commerce or transportation among the several States. This does not require an employee to be employed exclusively in the specified occupation. This does not require that the occupation in which he is employed be indispensable to the production under consideration. It is enough that his occupation be "necessary to the production." There may be alternative occupations that could be substituted for it but it is enough that the one at issue is needed in such production and would, if omitted, handicap the production.

The fact that the Vantress enterprise, as a hatchery and breeding farm, may not be subject to the Fair Labor Standards Act in its own right, also, is not material. There is nothing in the National Labor Relations Act, as amended, or its legislative history to suggest that Congress intended to exempt from the Board's jurisdiction employers engaged in industrial activity necessary to the production of agricultural commodities which move in commerce.

I find that the Respondent is engaged in com-

merce and business activities which affect commerce, within the meaning of the Act. In conformity with the Board's recently articulated policy in regard to the assertion of its jurisdiction over local enterprises that furnish services or material necessary to the operation of other enterprises engaged in the production of goods destined for out-of-state shipment,<sup>5</sup> I find that its assertion of jurisdiction in this case would effectuate the policies of the statute.

## II. The Labor Organization Involved

The American Federation of Grain Millers International Union, affiliated with the American Federation of Labor, is a labor organization, within the meaning of the Act, which admits employees of the Respondent to membership.

## III. The Unfair Labor Practices

### A. The refusal to bargain

#### 1. The appropriate unit

The Respondent is associated with two business enterprises in Marysville. One, a corporation known as the Farmers Public Warehouse and the High and Dry Warehouse, Inc., operates a public warehouse for the storage of grain and other materials. Adjacent thereto, in a separate building, the Respondent prepares animal and poultry feeds, doing business as the Sam Zall Milling Company. Although some of the ingredients used in the manufacture of

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<sup>5</sup>Hollow Tree Lumber Company, 91 NLRB No. 113.



his finished product are stored in the public warehouse and are handled by warehouse employees, the present case is concerned only with the persons employed by the Respondent in his milling enterprise.

His employees as a sole proprietor, in September and October of 1950, consisted of an office clerk, an outside salesman, one supervisor designated as in charge of production and sales, six men employed in the plant and a truck driver. Although each of the men employed in the plant was qualified to perform every function involved in its operation, they did have definite duties. One, I find, worked primarily as a feed mixer, another as a grinder man, a third as a take-off man, the fourth as a sack sewer. Two employees worked in the plant part of the time and drove a truck for the Respondent upon occasion as required.<sup>6</sup> In September and October of 1950, the Respondent's full-time truck driver delivered feed to the Respondent's customers; occasionally, he was required to bring to the mill materials required in the production of the feed. All of the men were paid at an hourly rate; there were differentials, but the spread between the lowest and the highest rate paid by the Respondent did not exceed ten cents per hour. These differentials, apparently, were based primarily on differences in the work performed and the factor of seniority.

The General Counsel alleges that the unit appro-

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<sup>6</sup>Upon occasion, the Respondent employed extra workers on a part-time or temporary basis, also.

priate for collective bargaining, in September and October of 1950, at the Respondent's plant, included all of his production and maintenance employees and the truck driver but excluded his office employee, the outside salesman, and Mr. Cotton—the supervisor previously mentioned. The Respondent, in his answer, denied the appropriateness of the unit thus defined; at the hearing, however, he objected only to the inclusion in the unit of the full-time truck driver and the part-time drivers, insofar as their assignments might involve driving work. The objection, as advanced, appears to be grounded in the Respondent's opinion that persons assigned to work as drivers ought to be represented, if at all, by another Union.

I find no merit in the Respondent's objection. The fact that persons employed as truck drivers on a full-time or part-time basis might be appropriately represented by a labor organization other than the Union involved in this case cannot, clearly, affect the appropriateness of the unit for which the Union seeks representative status. The Board has, in many cases, considered the relationship between truck drivers and other persons employed in a proposed production and maintenance unit. Its decisions with respect to their inclusion or exclusion from such units have been based upon a number of factors; the record in this case, however, is silent with respect to most of them. Whatever the present record shows or fails to show in this connection, however, it is clear in the light of previous decisions

that a production and maintenance unit which includes part-time and full-time truck drivers is not inherently inappropriate. Since all of the Respondent's employees are paid at an hourly rate, with relatively insignificant differentials, and since the only available evidence with respect to the desires of the full-time truck driver and one of the part-time drivers in regard to representation indicates, without contradiction, that they desired the Union to represent them. I conclude that the Respondent's full-time and part-time truck drivers may properly join the production and maintenance workers in his employ in a single unit, appropriate for the purposes of a collective bargain.

Upon the record, therefore, I find that all of the Respondent's production and maintenance employees including the truck driver, but exclusive of his office employees, salesmen, and supervisors as defined in the Act, constituted, and now constitute a unit appropriate for the purposes of collective bargaining with the Respondent within the meaning of Section 9 (b) of the Act.

## 2. The Union's majority

In October of 1950, at the time of the events with which this case is concerned, the Respondent's employees, within the unit herein found appropriate were seven in number. On September 12, 1950, one of them, Jess Stovall, at the solicitation of Cecil F. Gamble and John Hanifin, Union organizers, signed a card designated as an "Authorization and Application for Membership"; by its terms Stovall ap-

plied for membership in the Union and authorized it or a local affiliated with it, and its officers or representatives, to represent him in collective bargaining with the Respondent in regard to his hours of labor, wages, tenure of employment, and the other terms and conditions of his employment. Thereafter, on October 2, 1950, similar cards were signed by four other employees of the Respondent; Charles H. Adams, Earnest C. Curt, Otis A. Matthews, and R. C. Skinner. Gamble testified, without contradiction, that similar cards were subsequently executed by Gilbert Medina, a worker then employed as a combination truck driver and mill worker, and E. L. Howard, the Respondent's full-time truck driver. Since only five of the authorization cards executed have been submitted for the record, however—no cards having been offered for Medina and Howard—I have assumed in connection with the issue now under consideration, that the Union's claim to represent a majority of the employees is grounded upon the authorization cards executed by five of the seven employees in the unit herein found to be appropriate.

The Respondent contends that the authorization cards, received in evidence, may not be regarded as proof of the Union's representative status because the employees did not intend, in signing them, to apply for Union membership or to designate the Union as their collective bargaining representative, but intended merely—in the light of representations made by Gamble and Hanifin—to make possible a

petition for certification on the part of the Union, looking toward an election, under Board auspices, to establish its representative status. Although two of the employees did testify that they understood only that their signatures would permit the Union to file such a petition and bring about an election, I find no merit in the Respondent's contention. Gamble's testimony, which I credit, establishes that each of the employees was informed of the heading on the card he signed; that heading, previously noted, clearly established the character of the card as an application for membership and an authorization card. The employees, I find, were not misled, therefore, despite Gamble's admitted indication to them at the time, that he expected, in the normal course of events, to establish the Union's right to recognition through a Board election. In any event, absent proof that the employees were induced to sign the authorization cards by some unlawful means, it may be taken as datum that an employee's thoughts—or after-thoughts—as to why he signed a Union card, and what he thought that card meant, cannot negative the overt action involved in the execution of a card designating a Union as his bargaining agent.<sup>7</sup> I find that on October 2, 1950, the Union was, and at all times since has been, the duly designated representative of a majority of the Respondent's employees in the unit described above as appropriate for the purposes of a

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<sup>7</sup>Joy Silk Mills v. NLRB, 27 LRRM 2012, 2020 and the cases therein cited.

collective bargain. Pursuant to Section 9 (a) of the Act, it has been at all material times, and is now, entitled to act as the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, hours of work and other conditions of employment.

### 3. The refusal

On or about September 26, 1950, having secured an authorization card from Stovall, Gamble and Hanifin called upon the Respondent at the plant. Zall was advised that the Union planned to organize his employees. The testimony with respect to the conversation that ensued is not in conflict on material matters. Gamble's detailed version of it, which I credit, reads as follows:

He said that his plant was like a big family and that whenever he had any trouble in the plant why he went out and adjusted them and he said that he was a man of a few words and he laid his cards on the table and says, "I don't want a union here and my people do not need a union." And I stated to him that I could appreciate his position, now not knowing too much about the principles and policies of the organization, but after we had got better acquainted, why he would be more satisfied. And he says, "I have stated my position, we do not need a Union in this plant."

In the course of the conversation Gamble supplied the Respondent with a blank "Master Agreement"

utilized by the Union as a basis for negotiations. Zall stated that he would study it; in response to a request for an appointment he said that he would read it, study it, and make an appointment with Gamble to discuss it, if he (Zall) liked it, when Gamble returned in a week or so. The Union representatives then left.

On October 3, 1950, after having secured designation cards from a majority of the Respondent's employees, Gamble and Hanifin returned to the plant; they met the Respondent outside the plant office and held a conversation with him on the sidewalk before the front entrance. Gamble's testimony, which I credit, with respect to this conversation reads as follows:

I asked Mr. Zall if he had read and studied the contract; he said "Yes," he had; I asked him what he thought of it and he said he thought it was a very good contract but that was one man's opinion. I asked him if he would consent to a joint election which was customary between unions and employers for the purpose of recognition of the union as his employees' representative. He stated that he had already previously stated his position that he did not want a Union in the plant. I asked him if he would consent to an election if we had over thirty per cent \* \* \* thirty per cent of the membership signed up. Signed up means the authorization cards. He says, "Have you got them?" I said, "Yes." He said, "Let me see them." I said, "Oh, no." I said, "That is

for the Board, and if the Board decides to let you see the authorization cards, that will be another matter." He stated again that he had previously made himself known on this matter and at that time we should [leave] and he went into the plant and we left the premises.

Gamble also testified, credibly, that Zall, in the course of the conversation, had invited him to go ahead and petition for an election, but stated that his good relations with the Union would cease when it had its election. The Union, in fact, did file a petition for an election on October 4, 1950; the petition was withdrawn, however, on the 16th of the month.

In the meantime, on October 3, 1950, the Respondent, I find, questioned a number of his employees as to whether they had signed Union authorization cards. Three of the employees, at least, replied affirmatively; one of these, I find, also informed the Respondent that he had seen the others execute authorization cards.

Thereafter, at various times, Cotton sought to determine, in conversation, the desires of the men with respect to a modification of their rates of pay, wages, hours, and conditions of work. As a result of these conversations, on or about October 5, 1950, he drew up a document intended to embody the various employee suggestions, and discussed it with the men, informally, before work began. The consensus of opinion among the employees, apparently, was that Cotton's draft adequately expressed



their desires. On the 6th, Cotton took the draft to the Respondent. The latter, I find, came out of his office, read the draft to the men, and asked them, at an informal conference, whether its provisions were satisfactory. He received an affirmative reply. The draft was then reduced to typewritten form; it was signed by Zall in his office, and was presented thereafter to the plant employees, in their turn, for signature. Stovall, Curt, Skinner, Adams and Matthews signed the document.

Designated as a "contract," the document provided that the Respondent would pay the "same wages" as General Mills Corporation paid at its Marysville feed manufacturing plant, but that the grinder man would receive ten cents per hour in excess of the General Mills scale and the mixer man would receive five cents per hour in addition. The Respondent agreed that employees who had worked 40 hours in a given work week would not be "cut off" thereafter, if their 40th hour of work occurred before the end of the regular work week; he also agreed that, as far as possible, all available work would be assigned to the regular employees, even though overtime might be involved. Each of these commitments, as the record shows, involved a departure from past practice.<sup>8</sup> The record establishes that the agreement, in fact, called for a wage increase in order to enable the Respondent to reach

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<sup>8</sup>With respect to the second commitment, the record establishes that the Respondent had, in the past, met emergency situations which required extra work by the employment of part-time workers.

the "General Mills" scale. The exact date on which the increase became effective is not clearly established; the agreement, however, was intended, by its terms, to be effective from October 2, 1950, to October 2, 1951, with an "option of renewal" at that time.

### Conclusions

Under the Act, an employer is obligated to recognize any union which represents a majority of his employees, in a unit appropriate for collective bargaining, as the exclusive representative of such employees. In decisions too numerous to require or warrant citation, the Board has held that an employer's failure to grant exclusive recognition to the Union designated by a majority of his employees in an appropriate unit constitutes a refusal to bargain. And whatever type of conduct may be characterized, generally, as a refusal to recognize a union, it is clear—in this case—and I find, that the Respondent was guilty of such a refusal when he told the Union's organizer that he did not wish to negotiate a union contract, and thereafter, when he negotiated with the employees directly in regard to their wages, rates of pay, hours, and other terms and conditions of employment, and presented for their signature a document which embodied the substance of the matters agreed upon in such negotiations.<sup>9</sup> An employer cannot, as the Respondent did,

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<sup>9</sup>*Medo Photo Supply Corporation v. NLRB*, 321 U. S. 678; *J. I. Case Company v. NLRB*, 312 U. S. 332; *National Licorice Company v. NLRB*, 309 U. S. 350.

refuse to recognize the Union designated by a majority of his employees merely because he has been able to adjust grievances satisfactorily by unilateral action in the past.<sup>10</sup> I so find.

Ordinarily, it is true, an employer is not required to recognize and bargain with a Union until he receives a request for such recognition or the initiation of negotiations from the labor organization.<sup>11</sup> And the record, in its present form, does give rise to some doubt with respect to the Union's compliance with this requirement. It did not, in conformity with its usual practice, dispatch a letter to the employer advising him of its status as a majority representative and requesting a conference for the purpose of initiating negotiations. Nevertheless, despite the absence of evidence sufficient to establish that a formal request was made, the Respondent was, I find, effectively put upon notice with respect to the Union's desire to negotiate as the representative of his employees. When Gamble and Hanifin met Zall for the second time, they asked his opinion of the contract they had previously left with him. Zall construed their inquiry as a request to negotiate; he so testified. A request to bargain need not be presented in *haec verba* so long as there is one by clear implication.<sup>12</sup> I find that the Re-

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<sup>10</sup>Atlantic Refining Company, 1 NLRB 359; Ford Motor Company, 29 NLRB 873.

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<sup>11</sup>NLRB v. Columbian Enameling and Stamping Company, 306 U. S. 292.

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<sup>12</sup>Joy Silk Mills v. NLRB, 27 LRRM 2012, 2018.

spondent, on October 3, 1950, was requested to bargain.

The Union, it is true, never advised the Respondent that it did, in fact, represent a majority of his employees; Gamble made no claims in that regard when he presented his "request" that negotiations begin, and when that suggestion was rebuffed by the Respondent, he only claimed to represent a sufficient number to raise a question of representation. While the organizer's failure to claim, expressly, that the Union represented a majority, may have been somewhat inept, the absence of such a claim, in a formal sense, cannot be regarded as fatal to the General Counsel's case. Zall had made it perfectly clear, at each of his meetings with the Union organizer, that he did not wish to negotiate with the Union, and that he did not believe his employees needed union representation. Under the circumstances, Gamble was justified, I find, in the assumption that it would be futile to advance a claim with respect to the Union's representative status, or to offer proof of it in the form of authorization cards. The diversion of the conversation to the subject of a consent election and Board representation case procedure, in short, developed logically from Zall's expressed reluctance to deal with the Union; his attitude, I find, excused the Union's failure to claim status as a majority representative, or to offer proof in that connection.

Reference has already been made to Zall's express refusal to recognize or negotiate with the Union as a violation of the statute. In the present

state of the law, citation of authority is unnecessary to establish that his express refusal to negotiate with it was compounded by his subsequent action in negotiating directly with the employees. Despite the absence of evidence sufficient to establish that Zall was, in fact, aware of the Union's majority status when he negotiated and executed the agreement previously noted with his employees directly, there can be no doubt, upon the record, that the agreement in question, as negotiated and executed, was reasonably calculated to forestall and effectively to frustrate anticipated Union action.<sup>13</sup> Even if it be assumed, for the purpose of argument and in conformity with the Respondent's contention, that the grievances disposed of by the contract had been a subject of discussion at the plant before the Union organizers appeared, and before the Respondent became aware of the Union's organizational activity, it seems clear, and I find, that the adjustment of such grievances in a written instrument was precipitated by the Union's bid for recognition. Upon the entire record, therefore, I find that the Respondent, by the negotiation and execution of the agreement in question, in addition to his earlier statements with respect to his unwillingness to deal with the Union, refused to bargain with it in violation of the statute.

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<sup>13</sup>Curt testified explicitly, without contradiction—and I find—that Zall's comment after the agreement was signed was, in substance, "Now boys, when the election comes, you know how I would like to have you vote." The men did not reply.

### B. Interference, restraint and coercion

The record, with respect to the Respondent's interrogation of his employees in regard to their Union affiliation and his course of conduct in connection with the negotiation and execution of the agreement which they were ultimately induced to sign, has been detailed, adequately, elsewhere in this report. The Respondent's contention that his interrogation of the employees was prompted solely by a natural desire to ascertain the facts with respect to the Union's asserted interest—while understandable—cannot, in the light of accepted Board decisional doctrine, excuse his action. Upon the entire record, I find that the interrogation in question, and the Respondent's course of conduct with respect to the negotiation and execution of the agreement, interfered with, restrained, and coerced his employees in the exercise of rights guaranteed by the Act.

### IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent, set forth in Section III above, which occurred in connection with the operations of the Respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. The remedy

Since it has been found that the Respondent engaged and is now engaged in unfair labor practices, it will be recommended that he cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found, specifically, that the Respondent refused to bargain collectively with the Union as the exclusive representative of his employees in a unit appropriate for the purposes of a collective bargain. Accordingly, it will be recommended that the Respondent, upon request, bargain with the Union as such representative, and if an understanding is reached, embody such understanding in a signed agreement.

It has been found, also, that the Respondent negotiated and executed a contract with his employees, directly, immediately after being apprised of the Union's bid for recognition, which was reasonably calculated to forestall and frustrate anticipated Union action before the Board in a representation case. In this connection, it will be recommended that the Respondent cease giving effect to the contract in question, or any modification, continuation, extension, or renewal of it, to forestall collective bargaining or deter self-organization.<sup>14</sup> Nothing in this recommendation, however, should be construed by the Respondent to vary or abandon those wage, hour, seniority, or other substantive features of

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<sup>14</sup>Port Gibson Veneer and Box Company, 70 NLRB 319; Cf. C. Pappas Company, Inc., 82 NLRB 765, 796.

the relationship between him and his employees, established in the performance of the agreement in question, or to prejudice the assertion by the employees of any rights they may have under that agreement.

### Conclusions of Law

In the light of these findings of fact and upon the entire record in the case, I make the following conclusions of law:

1. The Respondent, Sam Zall, an individual doing business as Sam Zall Milling Co., is engaged in trade, traffic, and commerce, and business activities which affect commerce, within the meaning of Section 2 (6) and (7) of the Act.

2. The American Federation of Grain Millers International Union, affiliated with the American Federation of Labor, is a labor organization within the meaning of Section 2 (5) of the Act.

3. All of the Respondent's production and maintenance employees, including the truck driver, but exclusive of supervisors as defined in the Act, buyers, salesmen and office employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. The Union was on October 2, 1950, and at all times since has been, entitled to act as the exclusive representative of the employees in the aforesaid unit, for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

5. By his refusal, on October 3, 1950, and at all times thereafter, to bargain collectively with the Union as the exclusive representative of his



employees in a unit appropriate for collective bargaining, the Respondent engaged and has continued to engage in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

6. By his interrogation of the employees with respect to their Union affiliation, and by his course of conduct in connection with the negotiation and execution of an agreement with his employees, directly, the Respondent interfered with, restrained, and coerced his employees, and has continued to interfere with, restrain, and coerce them; thereby he did engage and has continued to engage in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

### Recommendations

Upon these findings of fact and conclusions of law, I recommend that the Respondent, Sam Zall, doing business as Sam Zall Milling Co., and his agents, successors, and assigns should:

1. Cease and desist from:

(a) Refusing to bargain collectively with the American Federation of Grain Millers International Union, affiliated with the American Federation of Labor, as the exclusive representative of all his production and maintenance employees, including the truck driver, but exclusive of supervisors as defined in the Act, buyers, salesmen and office employees;

(b) Giving effect to the agreement described in this Intermediate Report and Recommended Order, or any modification, continuation, extension, or renewal of it, to forestall collective bargaining or deter self-organization;

(c) In any other manner interfering with, restraining, or coercing his employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the American Federation of Grain Millers International Union, A. F. L., or any other labor organization, to bargain collectively through representatives of their own free choice, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with American Federation of Grain Millers International Union, A. F. L., as the exclusive representative of his employees in the aforesaid bargaining unit, with respect to their rates of pay, wages, hours of work, and other terms or conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Give a separate written notice to each of the employees who executed the agreement de-

scribed in the Intermediate Report and Recommended Order, or any modification, continuation, extension, or renewal thereof: (1) That he will not enforce or attempt to enforce the agreement in question to forestall collective bargaining or deter self-organization; (2) That employees will not be required or expected, by virtue of that agreement, to deal with the Respondent directly in respect to their rates of pay, wages, hours of work, or other terms and conditions of employment; (3) That such discontinuance of the contract is without prejudice to the assertion of any legal rights employees may have required under it, or to the assertion of any defenses thereto acquired by the employer;

(c) Post at his establishment in Marysville, California, copies of the notice attached to this report. Copies of the notice to be furnished by the Regional Director of the Twentieth Region, as the agent of the Board, should be posted by the Respondent immediately upon their receipt, after being duly signed by him or a person qualified to act as his representative, and should be maintained by him for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps should be taken by the Respondent to insure that these notices are not altered, defaced, or covered by any other material.

(d) File with the Regional Director of the Twentieth Region, as the agent of the Board, within twenty (20) days from the date of service of this Intermediate Report and Recommended Order, a

report in writing setting forth in detail the manner and form in which he has complied with these recommendations.

All parties are advised that upon the filing of this Intermediate Report and Recommended Order and the service of copies upon the parties—as provided in Section 203.45 of the Rules and Regulations of the National Labor Relations Board, Series 5, as amended, effective August 18, 1948—the Board will enter an order transferring the case to itself and will serve a copy of the order upon each of the parties, setting forth the date of the transfer.

#### Recommended Order

If, within twenty (20) days after the date of service of this Intermediate Report and Recommended Order, the Respondent satisfies the Regional Director, as the agent of the Board, that it has complied, or will comply with the foregoing recommendations, it is recommended that the National Labor Relations Board issue an order or take other appropriate action to close the case on compliance. Unless the Respondent satisfies the Regional Director, within twenty (20) days after the date of service of this Intermediate Report and Recommended Order, that it has complied or will comply with the foregoing recommendations, it is recommended that the National Labor Relations Board issue an order requiring the Respondent to take such action.

Dated this 6th day of March, 1951.

/s/ MAURICE M. MILLER,  
Trial Examiner.

United States of America Before the  
National Labor Relations Board

Case No. 20-CA-503

In the Matter of:

SAM ZALL, an Individual Doing Business as SAM  
ZALL MILLING CO.

and

A M E R I C A N F E D E R A T I O N O F G R A I N  
M I L L E R S I N T E R N A T I O N A L U N I O N ,  
A. F. L.

DECISION AND ORDER

On March 6, 1951, Trial Examiner Maurice M. Miller issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8 (a) (1) and (5) of the Act, and recommending that he cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the

Trial Examiner with the following additions and modifications.<sup>1</sup>

1. The Trial Examiner found, and we agree, that the Respondent interefered with, restrained, and coerced his employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby violating Section 8(a)(1) of the Act, as amended, by interrogating his employees concerning their union affiliations,<sup>2</sup> by bargaining separately with his employees, and by granting them wage increases and more favorable conditions with regard to the assignment of overtime work, in an effort to induce them to forsake the Union.<sup>3</sup>

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<sup>1</sup>The Respondent has excepted to the Trial Examiner's finding that he is engaged in commerce and business activities which affect commerce, within the meaning of the Act. The jurisdictional facts, as fully set forth in the Intermediate Report, show that during the year 1949 the Respondent sold feeds valued in excess of \$75,000 to the Vantress Hatchery and Breeding Farms, an enterprise which shipped eggs and poultry valued in excess of \$60,000 to points outside the State of California during the same calendar period. On the basis of these facts we find that the Respondent is engaged in commerce, within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this case. See *Camp Concrete Rock Company*, 94 NLRB No. 51, in addition to the cases cited by the Trial Examiner.

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<sup>2</sup>Cf. *Baxter Bros.*, 91 NLRB No. 233; *Standard-Coosa-Thatcher Company*, 85 NLRB 1358.

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<sup>3</sup>Cf. *Continental Nut Company, Inc.*, 91 NLRB No. 161; *Tennessee Valley Broadcasting Company*, 83 NLRB 895.

2. We agree with the Trial Examiner's finding that the Respondent has refused to bargain with the Union in violation of its obligations under Section 8 (a) (5) of the amended Act, for the following reasons:

The record is clear, as the Trial Examiner found, that the Union had secured authorization cards<sup>4</sup> from a majority of the employees in the appropriate unit<sup>5</sup> by October 3, 1950, the date of its second conference with the Respondent. As of that date the Respondent was obligated by law to recognize and bargain with the Union as the representative of his employees unless he entertained a good faith doubt as to the Union's majority status. Union Organizer Gamble's version of his conversation with the Respondent on October 3, 1950, indicates that the union agent did not state in so many words that the Union represented a majority of Respondent's employees and was formally requesting that the

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<sup>4</sup>In agreement with the Trial Examiner, we find that the employees' reasons for signing cards cannot affect the validity of those cards insofar as they establish the Union's status as bargaining representative of the employees who signed the cards.

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<sup>5</sup>Also in agreement with the Trial Examiner, we find that all production and maintenance employees at the Respondent's Marysville, California, plant, including the truck driver, but excluding office employees, salesmen, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. Respondent, in his exceptions, does not question the appropriateness of the unit.

Respondent bargain with it. But the Respondent was in no doubt, as his testimony reveals, that the Union was there to do business. And its business was the representation of his employees for the purposes of collective bargaining. "Words are not pebbles in alien juxtaposition."<sup>6</sup>

The Respondent testified that he interpreted the conversation to be what it obviously was, an attempt on the part of the Union to negotiate with him as the representative of his employees.<sup>7</sup> Previously the Union had left with the Respondent a collective bargaining agreement of the type that it normally executed with employers on behalf of their employees. The Respondent had read the contract which, among other provisions, expressly required recognition of the Union as the sole collective bargaining agent for those units of employees in which it had secured majority standing. We find that the Union, on October 3, 1950, in effect, requested recognition by the Respondent as the majority bargaining

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<sup>6</sup>L. Hand, C. J., in *NLRB vs. Federbush*, 121 F. 2d 954, 957 (C. A. 2).

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<sup>7</sup>Our dissenting colleague interprets this testimony as being with reference to a consent election agreement. However, the Respondent testified as follows: "Mr. Gamble or Mr. Hanifin [Union agents] stated that they would like to negotiate, and I told them that I wasn't interested in negotiating, and then they said, I believe, that in that case we would have to have an election . . ." (Emphasis added.)



representative of his employees.<sup>8</sup> We do not believe that the Union's attempt to secure the Respondent's agreement to a consent election after he had made it clear that he was otherwise opposed to collective bargaining in his plant means that the Union was not also seeking immediate recognition to which, on October 3, 1950, it was lawfully entitled. At most, the Union's conduct in this respect may reasonably be interpreted as an alternative attempt to achieve recognition without resorting to charges of unfair labor practices.

Another question would be presented had the Respondent, without more, suggested that the Union claiming to represent his employees secure certification through the normal processes of the Board. But the Respondent was not satisfied so to conduct himself. On the very day of his conversation with the Union he sought out and unlawfully interrogated his employees as to whether they had signed union authorization cards. By such unlawful tactics he had reason to know on October 3, 1950, that the Union actually had been selected as the majority bargaining representative of his employees. He continued, nevertheless, to reject the Union's efforts to engage in collective bargaining. Instead of complying with his statutory duty to recognize and bargain with the Union, he proceeded through other unfair labor practices, detailed in the Intermediate

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<sup>8</sup>For this reason we do not adopt the Trial Examiner's finding that no claim to majority status was made by the Union.

Report, to destroy the Union's majority among his employees. In this context the Respondent cannot argue that his refusal to recognize and bargain with the Union on October 3, 1950, was motivated by a good faith doubt as to its majority status.<sup>9</sup>

We find, contrary to the opinion of our dissenting colleague, that the Respondent's conduct on and after October 3, 1950, amounts to a refusal to bargain within the meaning of Section 8(a)(5) of the amended Act.

### The Remedy

The Respondent's unlawful conduct consisting of interrogation, negotiating individually with his employees to defeat the Union's organizational drive, and granting benefits for the same purpose, in our opinion, discloses a fixed purpose to defeat self-organization and its objectives. Because of this and its underlying purpose, we are convinced that the unfair labor practices found are persuasively related to other unfair labor practices prescribed by the Act; that the danger of their commission in the future is to be anticipated from the Respondent's conduct in the past; and that the preventive purposes of the Act will be thwarted unless our order is coextensive with the threat. In order, therefore, to make effective the interdependent guarantees of Section 7, and to prevent a recurrence of unfair labor practices, and thereby minimize industrial

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<sup>9</sup>Cf. *NLRB v. Morris P. Kirk & Son, Inc., et al.*, 151 F. 2d 490, 492 (C. A. 9); *Joy Silk Mills, Inc., v. NLRB*, 185 F. 2d 732 (C.A.D.C.).

strife which burdens and obstructs commerce, and thus effectuate the policies of the Act, we shall, in addition to entering a bargaining order against the Respondent, order the Respondent to cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the amended Act.

### Order

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Sam Zall, an individual, d/b/a Sam Zall Milling Co., Marysville, California, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the American Federation of Grain Millers International Union, affiliated with the American Federation of Labor, as the exclusive representative of all his production and maintenance employees, including the truck driver, but exclusive of supervisors as defined in the Act, salesmen, and office employees.

(b) Giving effect to the agreement made with his employees on October 5 or 6, 1950, or any modification, continuation, extension, or renewal thereof, to forestall collective bargaining or deter self-organization; provided, however, that nothing herein shall be construed to require the Respondent to vary any substantive provisions of such agreement, or to prejudice the assertion by the employees of any rights they may have thereunder.

(c) In any other manner interfering with, restraining, or coercing his employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the American Federation of Grain Millers International Union, A.F.L., or any other labor organization, to bargain collectively through representatives of their own free choice, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with American Federation of Grain Millers International Union, A.F.L., as the exclusive representative of his employees in the aforesaid bargaining unit, with respect to their rates of pay, wages, hours of work, and other terms or conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Give a separate written notice to each of the employees who executed the agreement of October 5 or 6, 1950, or any modification, continuation, extension, or renewal thereof: (1) That he will not

enforce or attempt to enforce the agreement in question to forestall collective bargaining or deter self-organization; (2) that employees will not be required or expected, by virtue of that agreement, to deal with the Respondent directly in respect to their rates of pay, wages, hours of work, or other terms and conditions of employment; (3) that such discontinuance of the contract is without prejudice to the assertion of any legal rights employees may have required under it, or to the assertion of any defenses thereto acquired by the Employer.

(c) Post at his establishment in Marysville, California, copies of the notice attached hereto and marked "Appendix A."<sup>10</sup> Copies of the notice to be furnished by the Regional Director for the Twentieth Region, as the agent of the Board, should be posted by the Respondent immediately upon their receipt, after being duly signed by him or a person qualified to act as his representative, and should be maintained by him for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps should be taken by the Respondent to insure that these notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Twentieth Region in writing within ten (10) days from

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<sup>10</sup>In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order," the words "A Decree of the United States Court of Appeals Enforcing."

the date of this Order what steps Respondent has taken to comply herewith.

Signed at Washington, D. C., June 29, 1951.

PAUL M. HERZOG,

Chairman,

JOHN M. HOUSTON,

Member,

JAMES J. REYNOLDS., JR.,

Member,

PAUL L. STYLES,

Member,

[Seal]

NATIONAL LABOR  
RELATIONS BOARD.

Abe Murdock, Member, dissenting in part:

While joining my colleagues in finding a violation of Section 8(a)(1) of the Act, I cannot further agree on the facts in this case that the Respondent on October 3, 1950, refused to bargain with the Union in violation of Section 8(a)(5) of the Act.

It is axiomatic that a refusal, particularly an employer's refusal to recognize and bargain with a union, must be preceded by a specific request. The Board has heretofore characterized such a request as "a clear and unequivocal demand for

recognition.”<sup>11</sup> An examination of the facts in the instant case reveals, as the majority concede, no evidence that the Union at any time specifically requested the Respondent to recognize it as the majority bargaining representative of his employees. Moreover, there is no evidence that the Union Representatives, who met twice with the Respondent, informed him that they were authorized by a majority of his employees to bargain on their behalf. Rather, it is apparent from the very testimony of the union agent, Gamble, that on October 3, 1950, the Union claimed only “over thirty per cent of the membership signed up.” The majority, however, are satisfied that Gamble’s conversation with the Respondent on October 3, 1950, together with the language of the general recognition clause contained in the blank “Master Agreement,” which the Union had left with the Respondent to “study,” constitute a sufficient request and claim to majority representative status. But the evidence, according to the credited testimony of the Union’s representative, reveals merely that the Respondent was put on notice that the Union was organizing his plant and was requesting him to agree to a consent election. It was in this context that Gamble, the union

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<sup>11</sup>The Solomon Company, 84 NLRB 226. This view has recently been affirmed by the U. S. Court of Appeals for the Sixth Circuit in *NLRB v. Valley Broadcasting Co.*, 28 LRRM 2148, where the court, reversing the Board majority’s finding in that case (77 NLRB 1144) and in agreement with my dissenting opinion, held that the respondent had never been presented with “a clear demand to bargain.”

agent, left the blank contract with the Respondent, expressing sympathy for the Respondent's anti-union position and suggesting that the Respondent did not know "too much about the principles and policies of the organization."<sup>12</sup>

The majority stress the Respondent's testimony that he interpreted the remarks of Gamble as an attempt to negotiate. But in words in the mouths of inexperienced witnesses are not words of art. It is clear that Gamble wanted to negotiate a consent election agreement. It is not clear, and I do not think the Board should so hold, that the Union was also requesting immediate recognition as the bargaining representative of the Respondent's employees.<sup>13</sup> While I fully agree with the majority

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<sup>12</sup>Although I agree with the Trial Examiner's finding that the Union made no claim to majority status, I cannot agree with his further finding that to do so would have been "futile." The record will not support a conclusion that the Respondent had demonstrated an inflexible determination to have no dealings with the Union. Indeed, he accepted the contract, read it, and subsequently told Gamble he thought it was "a good contract." Under these circumstances, it was incumbent upon the Union to speak up and state its claim to a majority and make a request to negotiate a contract so providing, if it was actually requesting anything more than a consent election agreement.

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<sup>13</sup>I cannot agree with the majority that the Respondent's use of the word "negotiate" in his testimony means "collective bargaining." Gamble's testimony, which the Respondent agreed was accurate, and which the Trial Examiner credits, reveals that Gamble said: "I asked him [Zall] if he would consent to an election if we had over thirty per cent." The Respondent asked to see the author-



that the Respondent's conduct following his conversation with Gamble on October 3, 1950, was in violation of the rights of his employees under the Act, I do not believe that such conduct may properly be substituted for the requirement that a union must clearly and affirmatively make known to an employer that it is the majority bargaining representative of his employees and desires immediate recognition for the purposes of collective bargaining. In my opinion, this requirement is a condition precedent to a finding that an employer had refused to bargain with a labor organization.

Accordingly, I would dismiss the allegation in the complaint that the Respondent has refused to bargain within the meaning of Section 8(a)(5) of the Act.

Signed at Washington, D. C., June 29, 1951.

ABE MURDOCK,  
Member.

NATIONAL LABOR  
RELATIONS BOARD.

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ization cards and Gamble refused. It was then, according to Gamble's credited testimony, that the Respondent said: "Go ahead and have your election." I interpret the testimony of the Respondent, cited in footnote 7 of the majority's opinion, to be in accord with Gamble's version of the conversation between them.

## Appendix A

## Notice to All Employees

## Pursuant to

## A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, I hereby notify my employees that:

I Will Not in any manner interfere with, restrain, or coerce my employees in the exercise of their right to self-organization, to form labor organizations, to join American Federation of Grain Millers International Union, A.F.L., or any other labor organization, to bargain collectively through representatives of their own free choice, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement which requires membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

I Will bargain collectively upon request with the above-named union as the exclusive representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All of my production and maintenance employees, including the truck driver, but exclusive of supervisors as defined in the Act, salesmen, and office employees.

I Will not give effect to the agreement executed by the employees on or after October 5, 1950, or any modification, continuation, extension, or renewal of it to forestall collective bargaining or deter self-organization.

All of my employees are free to become, remain, or refrain from becoming members of the above-named union, or any other labor organization, except to the extent that their right to refrain may be affected by a lawful agreement which requires membership in a labor organization as a condition of employment.

Dated .....

SAM ZALL MILLING CO.,  
Employer,

By .....,  
(Representative) (Title)

This notice must remain posted for 60 days after its date, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board  
[Title of Cause.]

## EXCEPTIONS TO INTERMEDIATE REPORT AND RECOMMENDED ORDER

Respondent Sam Zall respectfully excepts to the Intermediate Report and Recommended Order and specified as follows:

1. That the record herein shows that Respondent is not engaged in interstate commerce nor in business activities which would have a pronounced effect on commerce.
2. That the record fails to show that the above-named Union ever represented or represents the necessary percentage of Respondent's employees.
3. That the record fails to show an authorization and request to bargain or a refusal to bargain.
4. That if in fact Respondent is within the jurisdiction of this Honorable Board a representation election should be ordered.

RICH, CARLIN & FUIDGE,  
Attorneys for Respondent.

### Points and Authorities in Support of the Foregoing Exceptions

1. The Record Herein Shows That Respondent Is Not Engaged in Interstate Commerce Nor in Business Activities Which Would Have a Pronounced Effect on Commerce.

The Intermediate Report states as follows:

“In 1949, also, the Respondent sold, in California, poultry feeds valued at more than \$75,000 to the Vantress Hatchery and Breeding Farms, a business enterprise, which used these feeds in the production of poultry and eggs at its farms near Marysville.

The last twelve (12) lines of this page, i.e. page number one (1), constitute a portion of Respondent's brief, submitted to Board as part of the same document with exceptions to the Intermediate Report, and the said twelve (12) lines are not a part of the certified record.

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Before the National Labor Relations Board,

Twentieth Region

Case No. 20-CA-503

In the Matter of:

SAM ZALL MILLING CO.

and

AMERICAN FEDERATION OF GRAIN MILLERS,  
INTERNATIONAL UNION, A.F.L.

Tuesday, January 30, 1951

Pursuant to Notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m.

Before: Maurice M. Miller, Esq.,  
Trial Examiner.

## Appearances:

RICHARD H. FUIDGE, ESQ.,

RICH, CARLIN &amp; FUIDGE, ESQS.,

423 4th Street,

Marysville, California,

Appearing for Sam Zall Milling Co.

CECIL F. GAMBLE,

American Federation of Grain Millers,

International Union, A.F.L.,

610 Santa Clara Street,

Vallejo, California.

BEN LAW, ESQ.,

Appearing on Behalf General Counsel.

## Proceedings

Trial Examiner Miller: The hearing will be in order. This is a formal hearing before the National Labor Relations Board in the matter of Sam Zall, an individual doing business as Sam Zall Milling Company, Case No. 20-CA-503.

The Trial Examiner for the National Labor Relations Board is Maurice M. Miller.

Will counsel and other representatives of the parties state their appearances for the record?

Mr. Law: For the General Counsel of the National Labor Relations Board, Benjamin B. Law, Room 645 Pacific Building, 821 Market Street, San Francisco, California.

Mr. Fuidge: For respondent, Sam Zall; Rich, Carlin and Fuidge, 423 4th Street, Marysville, by Richard M. Fuidge appearing.

Mr. Gamble: For the International Federation of Grain Millers, AFL, 918 Metropolitan Building, Minneapolis, Minnesota; Cecil F. Gamble, 610 Santa Clara Street, Vallejo, California. [3\*]

\* \* \*

Mr. Law: Yes, I am. I will first offer as General Counsel's Exhibit 1, sub parts a to j, inclusive, the formal documents in the case and to identify them more specifically.

As General Counsel's Exhibit 1 part a, I offer the original charge in this matter filed under date of October 18, 1950, by the American Federation of Grain Millers International Union, AFL.

(Whereupon, the document referred to was marked General Counsel's Exhibit No. 1a for identification.)

As General Counsel's Exhibit 1b, an affidavit of service by [7] Ella P. Elliot, an agent of the National Labor Relations Board, of a copy of the original charge on Sam Zall Milling Company and General Counsel's 1b has attached to it a return receipt showing service upon Sam Zall's Milling Company as of October 21, 1950.

(Whereupon, the document referred to was marked as General Counsel's Exhibit 1b for identification.)

As General Counsel's Exhibit 1, sub part c, a copy of the first amended charge filed in the matter under date of December 15, 1950, by the same charging party.

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Whereupon, the document referred to was marked General Counsel's Exhibit 1c for identification.)

As General Counsel's Exhibit 1 sub part d, an affidavit of service by an agent of the National Labor Relations Board of a copy of the first amended charge on the employer, having attached to it a return receipt showing service as of December 18, 1950.

(Whereupon, the document referred to was marked General Counsel's Exhibit 1d for identification.)

As General Counsel's Exhibit 1 sub part e, I offer the original complaint issued by the Regional Director for the Twentieth Region of the National Labor Relations Board on January 5, 1951.

(Whereupon the document referred to was marked General Counsel's Exhibit 1e for identification.)

As General Counsel's Exhibit 1 sub part f, I offer the original notice of hearing issued by the Regional Director on the [8] same date as the complaint.

(Whereupon, the document referred to was marked General Counsel's Exhibit 1f for identification.)

As General Counsel's Exhibit 1, sub part g, an affidavit of service by an agent of the Board of the notice of hearing of the complaint and copy of the first amended charge upon the respondent, Sam



Zall, and the charging union and that affidavit having attached to it return receipts showing service upon the parties.

(Whereupon, the document referred to was marked General Counsel's Exhibit 1g for identification.)

As General Counsel's Exhibit 1 sub part h, the original order by the Regional Director rescheduling the hearing from January 18th to date, January 30th.

(Whereupon, the document referred to was marked General Counsel's Exhibit 1h for identification.)

As General Counsel's Exhibit 1 sub part i, the affidavit of service of the order rescheduling the hearing on the parties having attached to it return receipts showing service.

(Whereupon, the document referred to was marked General Counsel's Exhibit 1i for identification.)

And as General Counsel's Exhibit 1 sub part j, the original answer in this matter filed by the respondent, Sam Zall, an individual doing business as Sam Zall Milling Company. [9]

(Whereupon, the document referred to was marked General Counsel's Exhibit 1j for identification.)

I offer General Counsel's Exhibit 1a to j, inclusive.

Trial Examiner Miller: Is there any objection?

Mr. Fuidge: No objection.

Trial Examiner Miller: Very well, General Counsel's Exhibits 1a to j will be received in evidence.

(The documents heretofore referred to as General Counsel's Exhibits 1a to j were received in evidence.)

Trial Examiner Miller: Let the record show that the exhibit has been offered and received in duplicate.

Mr. Law: I might also note that I am offering the duplicate file of exhibits.

Trial Examiner Miller: Well, I so noted for the record with respect to General Counsel's exhibits. Is there anything else of a preliminary nature to come before us before we proceed with the testimony of any witnesses?

Mr. Law: Yes, I wish to move to amend the complaint in the following respects:

That after the words, "Marysville, California," in the first paragraph under section one of the complaint to be amended by striking the comma appearing after the word, "California," and adding the additional words, "from points in the United States outside the State of California." [10]

Mr. Fuidge: There will be no objection to that.

Trial Examiner Miller: Very well, there being no objection, the motion to amend is granted.

Mr. Law: Now, before the hearing——

Mr. Fuidge: Excuse me, Mr. Law, see if my answer now is—stands to this:

May the answer be amended to admit that during 1949, the respondent purchased grain, alfalfa concentrate and other materials valued at more than two hundred fifty thousand dollars, of which materials valued at more than ninety thousand dollars were shipped directly to the respondent's place of business in Marysville, California, from points in the United States outside of the State of California and alleges that said purchases were made from brokers within the State of California on contracts with said brokers that payment for said purchases were made to said brokers within the State of California.

Trial Examiner Miller: Is the intent of the amendment, Mr. Fuidge, to encompass within the terms of that last addition the entire amount of grain, alfalfa concentrate and other materials purchased, that is the entire amount of two hundred and fifty thousand dollars approximately or more?

Mr. Fuidge: I think I should confine it to the ninety thousand dollars alleged to have been received in interstate commerce.

Trial Examiner Miller: That, as far as I understand, would [11] be the only fact that would be material. Your allegation as to the amount physically originating outside of the state, the transfers, titles and payments were all made within the State.

Mr. Fuidge: That is correct.

Trial Examiner Miller: Is there any objection to the amendment?

Mr. Law: No, indeed not.

Trial Examiner Miller: Very well, the amendment to the answer is noted for the record.

Mr. Law: While we are on this line, Mr. Fudge and I have discussed the—before the hearing opened, certain stipulations of fact. In that connection I am prepared to stipulate as a fact that the allegation of the answer with respect to the purchases of materials originating outside the State being made through brokers within the State and payments being made to these brokers within the State, is the fact.

Mr. Fudge: I appreciate that extremely.

Trial Examiner Miller: Very well, the stipulation is noted for the record.

Mr. Fudge: Now, I am prepared to stipulate with Mr. Law a matter which was denied on the lack of information, I believe. Now, the stipulation being that as a matter of fact, during 1949, Vantress Hatchery and Breeding Farm sold and shipped from its farms near Marysville to points in the United States outside of California, eggs and poultry valued at more than sixty thousand [12] dollars.

Mr. Law: All right, thank you. Now, as I understand it in checking with Mr. Vantress you have obtained certain additional information from him which you wish to enter into the record by way of stipulation.

Mr. Fudge: Shall I put that in now? I might just as well.

Mr. Law: Yes.

Trial Examiner Miller: Well, if this is a separate stipulation, may we at this time note for the record in the—is it to be accepted?

Mr. Fuidge: I stated it before.

Trial Examiner Miller: It is noted for the record.

Mr. Fuidge: It is stipulated between Mr. Law and me, subject to his approval on the record here, that if Kenneth Vantress, I. K. Vantress, being one of the members of the Vantress Hatchery and Breeding Farms were called, that he would testify that the feed purchased by him from the respondent is fed only to breeding stock, that the feed is not fed to the baby chicks, that the breeding stock is not shipped out of the State and that out-of-State shipments consist in the main of eggs and that shipments of chicks are rare and in very minor percentage in proportion to the shipment of eggs. You would stipulate to that, Mr. Law, as a matter of fact?

Mr. Law: Yes, I would. Might I suggest in addition that the eggs or that he would testify that the eggs which are [13] shipped out of the State are primarily eggs for hatching baby chicks rather than for consumption?

Mr. Fuidge: That is correct. That is right. Now, without asking you to stipulate to the legal fact, will you stipulate that the Vantress Hatcheries is not subject to the provisions of the Wages and Hour Law and not until the enactment of the new Social Security Act was it subject to the provisions of the then existing Social Security Act?

Mr. Law: Well, let's see. I am a little disturbed to entering stipulations with respect to possible legal conclusions. I would stipulate that Mr. Vantress would so testify.

Mr. Fuidge: That is what I asked you, that Vantress would testify that he is not subject to Wages and Hours Law and not until the enactment of the present Social Security Act was his institution subject to the then existing Social Security Act.

Mr. Law: Yes.

May we stipulate further that Mr. Vantress would testify if called and further that it is the fact that the out-of-state shipments of Vantress Hatchery and Breeding Farms amounting in value to more than sixty thousand dollars, in 1949, consisted primarily of hatching eggs.

Mr. Fuidge: I will so stipulate.

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record. Let the record [14] show that during the period of discussion off the record that the Trial Examiner raised a question as to the state of the respondent's business and the business of Vantress Hatchery which has been the subject of stipulation heretofore in 1950, and its comparison, if any, with the figures previously mentioned applicable to 1949. I understand, as a result of our discussion off the record that the parties are prepared to enter into a stipulation with respect to the relationship between the

1950 business of the respondent and Vantress Hatcheries, as compared with the 1949 business set forth in the complaint and in the various stipulations.

Mr. Fuidge: That is correct.

Mr. Law: Yes, and in that connection I propose that stipulation that the figures, both with respect to both Sam Zall, individually doing business as Sam Zall Milling Company and Vantress Hatchery and Breeding Farms are approximately the same for the year 1950, as they were for the year 1949.

Mr. Fuidge: So stipulated.

Trial Examiner Miller: Very well, the stipulation is noted for the record.

Mr. Fuidge: In other words, where the complaint reads 1949, it may also read 1950.

Trial Examiner Miller: Well, should it become necessary for me to make a finding of fact in the matter, I would on the basis of the record as it now stands recapitulated in detail the [15] figures for 1949, and merely add the statement in terms of the stipulation, that the party agrees that 1950 was comparable.

Mr. Law: All right. As the first witness for the General Counsel, I will call Mr. Zall as an adverse witness.

## SAM ZALL

called as a witness by and on behalf of the General Counsel, being first duly sworn was examined and testified as follows:

## Direct Examination

By Mr. Law:

Q. Mr. Zall, your name is Sam Zall?

A. Yes.

Q. And you are the employer named as respondent in this matter, is that right? A. Yes.

Q. What is your business address?

A. 218 9th Street, Marysville, California.

Q. You do business as the Sam Zall Milling Company? A. Yes.

Q. And in the name filed under which you do business, is company spelled out or is it abbreviated? A. It is abbreviated.

Q. Co.? A. Yes.

Q. What is your business address?

Trial Examiner Miller: You have that.

Mr. Law: All right. [16]

Q. (By Mr. Law): For how long have you been engaged in business as the Sam Zall Milling Co.? A. Approximately eleven years.

Q. There is one commerce figure I would like to ask you about which we haven't already covered. Approximately what is the annual value of all of your sales?

A. Well, it is roughly five hundred thousand.



(Testimony of Sam Zall.)

Q. And that was true in 1949, and in 1950, as well?  
A. Yes.

Q. As I understand it, all of those sales are made in California, to purchasers in California?

A. Yes.

Q. Do you make any out-of-state sales at all?

A. No.

Q. And it is true, is it not, that your principal customer is the Vantress Hatchery and Breeding Farms?

A. They are the largest customer I have, yes.

Q. Now, one other question——

Mr. Fuidge: I beg your pardon, you mean that is the largest single customer?

Mr. Law: Yes, that was the intent of my question.

Trial Examiner Miller: Had you so understood the question?

The Witness: Yes.

Mr. Fuidge: Let me ask you, actually yes or no?

The Witness: Yes. [17]

Q. (By Mr. Law): Is your only place of business the Sam Zall Milling Co., in Marysville, California? That is, is that your only mill?

A. Yes.

Q. You have no other mills at other points?

A. No.

Q. Could you describe the physical plant here at Marysville?

(Testimony of Sam Zall.)

A. Well, we're engaged in the preparation of preparatory feeds and the sale of the same to farmers in the immediate vicinity.

Q. Well, you have two buildings, have you not, two adjacent buildings?

A. Well, there is just the one building, that is the Sam Zall Milling Co.

Q. I see. And one part of that building is devoted to storage of grain and other material, is it not?

A. One part of that building is for the purpose of storing the ingredients which are used in the manufacture of the finished product.

Mr. Fuidge: Let me see if I understand something here. There are two enterprises, the Sam Zall Milling Co., which Mr. Zall is the sole owner of. There is also a corporation which is known as the Farmers' Public Warehouse and High and Dry Warehouse, Inc., which is a warehouse incorporation and operates the public utility on the corner of 9th and B. Now, it may be [18] that some of the products, I mean the elements of the products prepared by the Sam Zall Milling Co. are stored in the utility. Perhaps that is what you have in mind.

Mr. Law: That may be. What confused me is——

Q. (By Mr. Law): Has Mr. Fuidge correctly stated the facts?

A. Yes, in other words, I store commodities in many public utility warehouses.

(Testimony of Sam Zall.)

Q. I see, all right. Now in your building where you operate the mill, do you have certain machinery for mixing and grinding the feeds and other materials?

A. I have the necessary machinery to prepare the feed.

Q. And in the same building, do you have an office?      A. Yes.

Q. Now, how many employees does Sam Zall Milling Co. have?

A. Well, we steadily have between nine and ten. Part of the time nine, and part of the time ten.

Trial Examiner Miller: That is exclusive of yourself?

The Witness: Yes.

Q. (By Mr. Law): Now, I want to get a brief description of the duties of each of those employees. You are in charge of the entire operation?

A. That is right, yes.

Q. And who is next in authority under you?

A. Well, there are two people, one is Mrs. F. Miles who is in charge of the office and then there is Mr. Cotton. [19]

Trial Examiner Miller: How is that name spelled?

The Witness: C-o-t-t-o-n.

A. (Continuing): —who is in charge of the production and sales as well as being salesman in the retail department.

Q. (By Mr. Law): Does Mrs. Miles have any clerical help under her?

(Testimony of Sam Zall.)

A. No one steadily, no.

Q. She attends to the bookwork involved in the business, does she?      A. That's right.

Q. And she works in an office entirely?

A. That's right.

Q. Now, does Mr. Cotton, in practice, hire or discharge employees?

A. Only with—in conjunction with myself.

Q. He discusses the matter with you?

A. That's right.

Q. Does he make recommendations with respect to the hiring or discharging employees?

A. Yes, he does.

Q. And do you consider those recommendations in reaching your decision?

A. Most of the time, yes.

Q. Now, what other employees do you have—I am interested now in the type of work that they do, their classifications rather [20] than their particular name.

A. Well, we have a—the sack sewers, the feed mixers, grinder man, truck drivers——

Trial Examiner Miller: Just a moment, you spoke of a sack sewer, feed mixer, grinder man, one person to each of those titles?

The Witness: Not necessarily, as a matter of fact, they are all sack sewers, actually.

Trial Examiner Miller: Well, I was interested because as I got your testimony, these were all mentioned in the singular and then you spoke of truck drivers in the plural.

(Testimony of Sam Zall.)

The Witness: Well, we do have two truck drivers, but those could all be in plural, because every small business of the type I have, every man is more or less ambidextrous, you might say. He works in every job.

Trial Examiner Miller: Go ahead, I won't interrupt further.

The Witness (Continuing): —they have definite duties, however, they do fill in wherever it is necessary and they can do any one of those jobs.

Q. (By Mr. Law): Are there any other classifications? A. I have a salesman.

Q. Is that salesman, Mr. Cotton?

A. No, that is Mr. Darchuck, he is an outside salesman.

Q. How is his name spelled?

A. D-a-r-c-h-u-k. [21]

Q. Is his part of the work to visit your customers and make sales to them? A. That's right.

Q. Does he regularly work in the plant?

A. No.

Mr. Fuidge: Work in the what, Ben?

Mr. Law: In the plant.

Q. (By Mr. Law): Now, any other types of employees in the plant?

A. Well, the only other classification you might have would be the take-off men, that more or less ties in with other classifications.

Q. What is the function of the take-off man?

A. Well, the man that fills the sack with the feed that's been prepared, and hands the sack over

(Testimony of Sam Zall.)

to the sack sewer, who sews it on the sewing machine.

Q. All right. Now, these employees you have named, the employees you have referred to as sack sewer, feed mixer, grinder man, truck drivers and take-off man are somewhat interchangeable; any man might perform any of those functions?

A. Most of the functions, at least.

Q. You do, however, have one employee who ordinarily specializes as the grinder man, do you not?

A. Yes.

Q. And you have one who specializes as feed mixer? [22]

A. That's right.

Q. Now, the two truck drivers, do they confine themselves entirely to driving trucks or do they work in the plant?

A. One truck driver confines himself entirely to driving a truck and the other truck driver works in the plant part of the time and drives the truck another part of the time as the need requires.

Q. And the truck driver who drives entirely delivers the feed from the mill to the customers, does he not?

A. That's right.

Q. Does he also bring deliveries of the materials or the ingredients going into the feed from suppliers?

A. On rare occasions.

Mr. Fuidge: If I may interpose an objection here. That insofar as the drivers are concerned, or with particular reference to the ones that only drive, it may be entirely incompetent, irrelevant and immaterial in that I understand the Teamsters

(Testimony of Sam Zall.)

Union, whom I assume would have jurisdiction of such vocation.

Mr. Law: Well, if I may, I am interested in establishing facts now and I think that perhaps your objection is going to the inclusion of the truck drivers in the unit rather than to the admissibility of the evidence of his duties.

Mr. Fuidge: That may be.

Trial Examiner Miller: Off the record.

(Discussion off the record.) [23]

Trial Examiner Miller: On the record.

Q. (By Mr. Law): Now, Mr. Zall, I am going to ask a few questions about comparative pay rates; I am not going to ask about specific rates. Do the employees who work as sack sewer, feed mixer and grinder man, truck drivers and take-off men, receive substantially the same rate of pay?

A. Well, substantially, there are differences.

Q. There are differences, yes. Are they all paid an hourly rate? A. Yes.

Q. And how great is the difference between the highest and the lowest in terms of cents?

A. About 10 cents an hour, I believe.

Q. Is that difference based primarily on seniority of the employee, or is it based upon the type of job which he performs most of the time or a combination of both?

A. Well, yes, you could say a combination of both.

Q. Now, as I understand it, either you or Mr.

(Testimony of Sam Zall.)

Cotton direct the work of the other employees at the plant, is that correct?

A. Well, when necessary. By far and large every man knows what he has to do; it is such a small plant it isn't necessary to do much correcting. Occasionally there is some guiding to do as far as what has to be done that particular day or something unusual might have to be done, they might have to be told about it. [24]

Q. And you are—if you are there, you make the decision in that respect, do you?

A. That is right.

Q. And if you are away, then it is Mr. Cotton that is responsible for making the decision?

A. That's right.

Q. Now, as of October 3, 1950, which is the date of the alleged refusal to bargain, who were the particular employees performing the duties of sack sewer, feed mixer, grinder man, truck drivers and take-off man? I would like to get the names of the people employed as of October 3, 1950.

A. Mr. Adams, Mr. Mathews.

Q. First names? A. Chuck Adams.

Q. Is that Charles Adams?

A. I think it is. I don't know, to be honest with you.

Trial Examiner Miller: Would you identify them by job description that most nearly describes the work that he does?

The Witness: Take-off man. Otis Mathews, sacksewer; Ernest Curt, mixer man—



(Testimony of Sam Zall.)

Trial Examiner Miller: How is that name spelled?

The Witness (Continuing): —C-u-r-t. Jess Stovall, grinder man; S-t-o-v-a-l-l. I can't think of Red's name—R. E. Skinner.

Q. (By Mr. Law): What is his general classification? [25]

A. Well, he is combination truck driver and mill worker; he fills in wherever he is needed.

Q. Now, did you——

A. There is Roy Shoemaker.

Q. He was employed as of October 3rd?

A. No, he wasn't; he came after. He had, however, been employed before, for a short interval; he was gone, and then he came back.

Trial Examiner Miller: His name is spelled how?

The Witness: Shoemaker, S-h-o-e-m-a-k-e-r; he is an assistant grinder man.

Q. (By Mr. Law): As of October 3, 1950, you say he was not working. Had he resigned? Was he ill?

A. Well, he had gone to work for this other enterprise I am interested in, which is the High and Dry Warehouse and the Farmers' Public Warehouse, by my direction.

Q. You had transferred him to this other enterprise? A. This other occupation, yes.

Q. And then subsequently you called him back?

A. No, his work was finished out there and he came back.

(Testimony of Sam Zall.)

Q. All right; now, did you have a C. L. Howard or Gilbert Medina as of October 3, 1950?

A. Yes.

Trial Examiner Miller: That name is C. L. Howard?

The Witness: That's right—E. L. Howard, he was a truck driver. [26]

Q. (By Mr. Law): Was he a full-time truck driver? A. Yes, he was.

Q. Gilbert Medina; what was his?

A. He was a combination truck driver and mill worker.

Q. I take it, then, that either Mr. Skinner or Mr. Medina or both of them did some truck driving and worked in the mill as well?

A. Yes, they did.

Q. And that Mr. Howard was the full-time driver?

A. That is right. However, those two last men mentioned are now in the armed services of the United States of America, no longer employed at my establishment.

Mr. Fuidge: Which two is that, Howard and Medina?

The Witness: That's right, Howard and Medina.

Q. (By Mr. Law): When did they leave to enter the Army?

A. Oh, in the last thirty days.

Q. Now, a few additional questions to complete the record: Charles Adams' middle initial is H., is it not? A. I wouldn't swear to it.

(Testimony of Sam Zall.)

Q. Do you know if Otis Matthews' middle initial is A?      A. I wouldn't know.

Q. And Ernest Curt, is his middle initial C, or do you know?      A. I don't know.

Mr. Law: I might state that I propose to offer some evidence [27]—in the form of authorization for membership cards indicating that such are the middle initials of the people named, if there is any dispute about the name being that of some other fellow.

Mr. Fuidge: If you tell me those are their initials, Mr. Law, that is good enough for me.

Mr. Law: Well, I have no personal knowledge on it.

Mr. Fuidge: Well, if the records show that, that is good.

Q. (By Mr. Law): Now, which of the employees you have named are still working for you, Mr. Zall?      A. Well—

Q. I will run down the list if that makes it easier: Charles Adams?      A. Yes.

Q. Otis Matthews?      A. Yes.

Q. Ernest Curt?      A. Yes.

Q. Jess Stovall?      A. Yes.

Q. R. C. Skinner?      A. Yes.

Q. Roy Shoemaker is working for you now, is he?      A. Yes.

Q. And you have already testified that E. L. Howard and Gilbert Medina have gone into the armed services? [28]      A. Yes.

(Testimony of Sam Zall.)

Q. Have you replaced Howard and Medina with any other employees?

A. Medina has been replaced by Skinner, who has been already on the pay roll, and Howard has been replaced by Ernst—I can't think of his last name.

Q. All right. I don't think it matters.

A. At any rate, he has been replaced.

Q. And have the following people worked continuously for you since October 3, 1950: Charles Adams? A. Yes.

Q. Otis A. Matthews? A. Yes.

Q. Ernest Curt? A. Yes.

Q. Jess Stovall? A. Yes.

Q. And R. C. Skinner? A. Yes.

Mr. Law: No other questions at this time. I may recall Mr. Zall.

Mr. Fuidge: We have no questions of Mr. Zall at this time.

Trial Examiner Miller: Very well. There is just one thing I wanted to get clear on.

You gave us a list of the various jobs, job functions or [29] job titles that were performed in your mill, and then later on in response to Mr. Law's questions you named these seven individuals, five of whom are still in your employ and doing those functions. Are there any other persons in the employ of your company that work as sack sewer, feed mixer, grinder man, take-off man or truck drivers other than the five individuals still in your employ who perform those functions of the two

(Testimony of Sam Zall.)

individuals who were in your employ in October?

The Witness: Any steady employees, you mean?

Trial Examiner Miller: Well, if there is the problem of some part-time employees, we would like to hear about it.

The Witness: Well, occasionally we do hire some part-time employee, and I can't tell you his name because he has only been there a short time and only worked as we needed him.

Trial Examiner Miller: Well, is the employment of a short-time or part-time employee a seasonal phenomenon or does it happen at odd times during the year?

The Witness: At odd times.

Trial Examiner Miller: About how frequently?

The Witness: Oh, it might be once a week; it might go along for a month without getting part-time help. There are times when we might hire as high as five part-time employees for one or two days.

Trial Examiner Miller: What sort of situation would create that necessity? [30]

The Witness: Oh, the arrival of the cars or ingredients that have to be unloaded, or possibly the fact that some man might be sick.

Trial Examiner Miller: Well, the hiring of this part-time help, is that in relation to the business of the milling or the business of this public warehouse that you have been speaking about?

The Witness: No, that is in relation to the business of the milling company.

(Testimony of Sam Zall.)

Trial Examiner Miller: But if I understand you correctly, that would be on an intermittent basis, with no regularity to it at all?

The Witness: No regularity whatsoever.

Q. (By Mr. Law): And do the people who are from time to time hired for extra work—I should reverse the question—do the regular employees ordinarily do the type of work for which you occasionally hire extra people?

A. Well, they do and they don't. In other words, I don't hire four or five extra men and two or three extra men to replace Ernest Curt, for instance. If he is on the job and there, that's his job, and no one else is hired to do his work or similar work.

Q. What I intended was, I understand that if you had, say, a large shipment of materials that had to be unloaded, you might have to hire extra people? [31]

A. That's right.

Q. But in the ordinary course of receiving routine shipments, the people you have already named here as the regular employees do the work, do they not?

A. Whenever it is possible and feasible, they do the work.

Q. And occasionally there is simply too much for them?

A. Either too much or there is a time limit for unloading the cars. We only have forty-eight hours to unload the cars, if they do come by car, and they have to be unloaded in that period, and it is not

(Testimony of Sam Zall.)

feasible for the regular employees that are there to unload it and we have to get extra help.

Mr. Law: No further questions.

Mr. Fudge: No questions at this time.

Trial Examiner Miller: You are excused.

(Witness excused.)

Mr. Law: Now, to keep the record clear as we go along, I might observe that the appropriate unit as alleged in Paragraph 3 of the complaint is intended to cover the persons who perform the work Mr. Zall has just described of sack sewing, feed mixing, dragger-man, truck drivers, take-off men and any other incidental jobs such as unloading, the physical production jobs in the mill, and the intent is to exclude Mrs. Miles as an office employee and Mr. Cotton as both a salesman and a supervisor, and further to exclude Mr. Darchuk as a salesman.

Trial Examiner Miller: Very well. The record will so show. [32]

Mr. Law: As the next witness for the General Counsel, I will call Mr. Gamble.

**CECIL F. GAMBLE**

called as a witness by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

**Direct Examination**

By Mr. Law:

Q. What is your full name, for the record, Mr. Gamble? A. Cecil F. Gamble.

(Testimony of Cecil F. Gamble.)

Q. What is your business address?

A. 610 Santa Clara Street, Vallejo, California.

Q. What is your business or occupation?

A. An organizer for the American Federation of Grain Millers, International Union, 918 Metropolitan Building, Minneapolis 1, Minnesota.

Q. And how long have you held that position?

A. Since May 15, I believe.

Mr. Fuidge: 1950?

The Witness: 1950.

Q. (By Mr. Law): That organization you have named is the organization who filed the charges in this matter? A. That's right.

Q. Did you have any position with it before May 15, 1950?

A. I have been the president of Local 71 of the American Federation of Grain Millers International of Vallejo, California, for [33] four years. I was just sworn in the last December for the fifth term.

Q. Now, what is the American Federation of Grain Millers?

A. The American Federation of Grain Millers International Union is a duly chartered organization by the American Federation of Labor and has jurisdiction of over-all production of grain, rice, soy beans or any commodities that would be grain for human and animal consumption.

Q. In your capacity as an organizer for the union since May 15, 1950, and as president of Local



(Testimony of Cecil F. Gamble.)

71 in Vallejo for four years, do you know whether or not the union has a constitution and bylaws?

A. They do.

Q. I will show you a booklet marked for identification as General Counsel's Exhibit 2 and ask you if that is the constitution of the charging union?

(Whereupon the document referred to was marked as General Counsel's Exhibit No. 2 for Identification.)

A. This is the constitution and bylaws of the American Federation of Grain Millers International Union.

Mr. Counsel, I would like to make one correction. I made a statement that I was the president for five years for the American Federation of Grain Millers International. Now, we have only been duly chartered for two years. It was the American [34] Federation of Grain Processors, prior to two years ago. Just for clarification, that is.

Q. There has been a change?

A. There has been a change. We had—have the international charter for two years.

Q. Under the present name?

A. That's right.

Q. All right. Does the union seek to represent employees of various employers in the milling industry? A. Yes.

Q. Does it, in fact, have contracts covering wages, hours and conditions of work for such employees with various employers? A. Yes, sir.

(Testimony of Cecil F. Gamble.)

Mr. Law: I will offer General Counsel's Exhibit 2 in evidence. The purpose of this testimony is simply to establish that the union is a labor organization within the meaning of the Act.

Trial Examiner Miller: Since—well, I was going to make an observation, but I will wait for the development of the record. You offer it for the record?

Mr. Law: Yes.

Trial Examiner Miller: Is there any objection?

Mr. Fudge: No.

Trial Examiner Miller: Very well. General Counsel's Exhibit No. 2 will be received into evidence, there being no objection. [35]

(The document heretofore referred to as General Counsel's Exhibit No. 2 for Identification was received in evidence.)

Trial Examiner Miller: For the sake of the record, Mr. Witness, at this time will you direct my attention to those portions of the exhibits which are germane to the issue?

Mr. Law: I think the primary article I am interested in is Section 2 of Article 1. That appears on page 1 of the booklet and is titled "Object."

Trial Examiner Miller: Very well. I merely wanted that for the record so that we wouldn't have to search all four corners of the document.

Trial Examiner Miller: Off the record.

(Discussion off the record.)

(Testimony of Cecil F. Gamble.)

Trial Examiner Miller: On the record.

Q. (By Mr. Law): Now, Mr. Gamble, have you ever met and had any conversation with Mr. Sam Zall, who just testified here this morning, prior to today? A. Yes, sir.

Q. When did you first meet or have any conversation with him?

A. Around September 26th, if I am not mistaken. I don't remember exactly the date.

Q. It was about—of what year?

A. Of 1950.

Q. And where was the meeting? [36]

A. In his office at his plant in Marysville.

Q. Was anyone else present besides you and Mr. Zall? A. Mr. Hanifin was present.

Q. Who is Mr. Hanifin?

A. Mr. Hanifin is my assistant as an organizer of the American Federation of Grain Millers.

Q. And what is his first name? A. John.

Trial Examiner Miller: How is that last name spelled?

The Witness: H-a-n-i-f-i-n.

Q. (By Mr. Law): Was anyone else present aside from Mr. Hanifin and you and Mr. Zall?

A. No.

Q. Now, what was your conversation with Mr. Zall on that occasion?

A. I went in to meet Mr. Zall and make his acquaintance and express our desires to organize his employees, to make his acquaintance——

Mr. Fuidge: I submit this is not responsive to the question.

(Testimony of Cecil F. Gamble.)

Q. (By Mr. Law): My question was: What was the conversation, not what you went in for.

A. I am sorry. The conversation—may I get off the record for a minute? I want to ask a question.

Trial Examiner Miller: Off the record.

(Discussion off the record.) [37]

Trial Examiner Miller: On the record.

The Witness: We met Mr. Zall, we stated our position that we were planning on organizing his employees and starting an organizing drive in this area. The balance of the conversation was to explain the purposes and principles of the American Federation of Grain Millers and to present him with a contract for his study and approval.

Q. (By Mr. Law): Well, now, let's see. I am not sure that we were getting what was actually said. As I understand it, you went in and told Mr. Zall that you intended to seek representational rights for his employees? A. That's right.

Q. And did he make any reply?

A. He said that his plant was like a big family and that whenever he had any trouble in the plant why he went out and adjusted them, and he said that he was a man of a few words and he laid his cards on the table and says, "I don't want a union here and my people do not need a union." And I stated to him that I could appreciate his position, now not knowing too much about the principles and policies of the organization, but after we had got better acquainted, why he would be more satis-

(Testimony of Cecil F. Gamble.)

fied. And he says, "I have stated my position; we do not need a union in this plant."

Q. All right. Now, you said something about leaving a contract or a proposed contract. What happened in that connection? [38]

A. I presented him with a contract, he accepted it.

Mr. Fudge: Wait just a minute. I will object to that as being a conclusion of the witness. Unless he means by that that he took it in his hands.

Mr. Law: Well, let's see, I intend to offer the document. It isn't, of course, offered to establish any contract, but if I may, I think I will clear that up.

Trial Examiner Miller: I will defer ruling on the objection.

Mr. Law: I think Mr. Fudge's objection is well taken.

Trial Examiner Miller: Very well; for the record, then, to clear up any further developments, the answer will be disregarded to the extent that it implies a legal acceptance of the document.

Mr. Fudge: Thank you.

Q. (By Mr. Law): I will show you a document consisting of ten mimeographed pages and ask if that is what you have referred to as a contract which you presented to Mr. Zall?

A. That is the same as I presented to Mr. Zall.

Q. Did you present it to Mr. Zall in the same form as it appears on General Counsel's Exhibit No. 3, did you?

A. I did.

(Testimony of Cecil F. Gamble.)

Q. All of the blanks were blank?

A. That's right.

Q. Now, did you have any conversation with respect to General Counsel's Exhibit No. 3 for Identification? A. This is number 3?

Q. Yes, the proposed contract? [39]

(Whereupon the document referred to was marked as General Counsel's Exhibit No. 3 for Identification.)

A. No, we didn't go into any discussion, other than Mr. Zall stated that he would take the contract and study it. I endeavored to make an appointment and he said that he would take it and read it and study and bring it back, and for me to drop back in a week or so and if he liked it he would make an appointment at that time.

Q. And was that all you remember of the conversation on or about September 26th?

A. That is right. We left the premises at that time.

Q. Now, as I understand it, you told Mr. Zall that you intended to seek to organize his employees. As of the time of that conversation, had you engaged in any organizational activities among the employees?

A. We had one man, Jess Stovall.

Mr. Fuidge: That is not responsive to the question and doesn't answer it. Object to it as such.

Trial Examiner Miller: Well, I would assume

(Testimony of Cecil F. Gamble.)

it to be partly responsive at least; can you develop it further, Mr. Law?

Q. (By Mr. Law): Yes; when you say you had one man, what do you mean?

A. I had one man's application card made out. A recognition card.

Q. Had you contacted any of the other [40] employees?

A. We had not had the opportunity at that time. We had given the card to Mr. Stovall.

Q. Well, he was the only employee?

A. Yes, that's right.

Q. Now, when had you seen Mr. Stovall or approximately when?

A. Around the 18th of September, if my memory serves me right.

Q. Now, where was it that you saw Mr. Stovall for the first time?

A. We saw him at the plant. We invited him to the hotel that evening.

Q. And did he sign an authorization or membership card at any time when you saw him?

A. That evening at the hotel.

Q. I show you General Counsel's Exhibit No. 4 for Identification and ask you if you have seen that before?

(Whereupon the document referred to was marked General Counsel's Exhibit No. 4 for Identification.)

A. I saw that and that is my signature at the bottom—attached.

(Testimony of Cecil F. Gamble.)

Q. When did you first see this, General Counsel's Exhibit No. 4?

A. You mean the first time I saw it?

Q. Yes.

A. It was the date that I made it out, or do you want it as an exhibit?

Q. Yes. [41] A. Just at this moment.

Q. Well, did you see it at the time you saw Mr. Stovall at the hotel?

A. Well, yes, definitely.

Q. And did Mr. Stovall sign it?

A. Mr. Stovall signed it.

Q. Did you see him sign it?

A. That's right.

Q. And was he the same man you had seen earlier at the plant? A. That's right.

Q. All right. Now, did you subsequently see, or have any conversations with other employees at the plant?

A. Not up to that time, but at a later date we did.

Q. And when was that that you——

A. October 2, if my memory serves me right.

Q. Where did you first see the other employees?

A. I first saw them when I saw Mr. Stovall, but I did not contact them until October 2nd, if my memory serves me right on that date.

Q. When you saw them, you mean——

A. I just saw them, but I did not discuss anything with them at that time.



(Testimony of Cecil F. Gamble.)

Q. Now, on October 2nd, did you have any conversation with any of the other employees?

A. I did. [42]

Q. And where was this conversation?

A. It was on the premises of the Sam Zall Milling Co.

Q. I will show you four additional——

Mr. Fuidge: Excuse me, did you offer that No. 4?

Mr. Law: I have not; they are just identified.

Mr. Fuidge: The contract is 3, is it?

Trial Examiner Miller: Yes.

Q. (By Mr. Law): I will show you four additional white cards which I have marked for identification as General Counsel's Exhibit—Exhibit 5, sub part a to d, inclusive, and ask you if you have seen those before?

(Whereupon the documents referred to were marked as General Counsel's Exhibit 5, a to d, inclusive, for identification.)

A. Yes, sir, I have.

Q. And when did you first see them?

A. I saw them the date that they were made out.

Q. And when was that?

A. It was on October 2nd, as I previously stated.

Q. Well, now, you say "when they were made out"; did you see the persons whose names appear thereon?

A. I did, and I had a conversation with them in regard to their signing an application card.

(Testimony of Cecil F. Gamble.)

Q. Did you see each of the individuals sign his card where the place appears, "Signature of applicant," on the lower left-hand [43] corner of the card? A. I did.

Q. And does your signature—or did you sign the right-hand corner of each card?

A. I signed the right-hand corner of each—of these, and one of them is Mr. Hanifin.

Mr. Fuidge: What is the name of those cards?

The Witness: Curt, Skinner and Adams were the three I signed at the plant, and Matthews who signed at the hotel that evening, and in the right-hand corner Mr. Hanifin signed as an authorized signature.

Q. (By Mr. Law): Yes, that is referring to General Counsel's Exhibit 5, sub part b. Did you see Mr. Matthews, however, sign General Counsel's 5, sub part b? A. I did.

Q. Now, did you subsequently obtain signed applications for membership cards from other employees at the plant? A. Yes, sir, I did.

Q. When was that? A. Well, it was——

Q. How long after?

A. Well, it was not very long; it would be within the next two or three weeks after this that Mr. Howard and Medina.

Q. Now, after, on or about September 26th, did you meet with Mr. Zall and have any conversations with him? [44] A. You mean——

Q. After September 26th?

A. Not until October the 3rd, I believe.

(Testimony of Cecil F. Gamble.)

Q. How do you place the date, October 3?

A. It was right after we had signed the employees on October 2. It was the next day.

Q. All right, and where was this meeting with Mr. Zall?

A. Outside of his office where we met, and we walked out onto the sidewalk by the front door entrance to his plant.

Q. Was anyone else present?

A. Mr. Hanifin was present.

Q. Anyone else?           A. No.

Q. Now, what was your conversation with Mr. Zall on that occasion?

A. I asked Mr. Zall if he had read and studied the contract. He said "Yes," he had. I asked him what he thought of it, and he said he thought it was a very good contract, but that was one man's opinion. I asked him if he would consent to a joint election which was customary between unions and employers for the purpose of recognition of the union as his employees' representative. He stated that he had already previously stated his position that he did not want a union in the plant. I asked him if he would consent to an election if we had over thirty per cent. [45]

Q. Thirty per cent what?

A. Thirty per cent of the membership signed up. Signed up means the authorization cards. He says, "Have you got them?" I said "Yes." He said, "Let me see them." I said, "Oh, no." I said, "That is for the Board, and if the Board decides

(Testimony of Cecil F. Gamble.)

to let you see the authorization cards, that will be another matter.” He stated again that he had previously made himself known on this matter and at that time we should have, and he went into the plant and we left the premises.

Q. You say he stated that he had previously made himself known on this matter. Are you attempting to repeat his words?

A. I was attempting to repeat his words as nearly as I possibly could, yes.

Q. Is that all you remember about your conversation with him?

A. That is all at this time that I can remember.

Q. Did you discuss petitioning for an election?

A. Well, I did discuss petitioning for an election.

Q. What did you say in that connection?

A. I said to him, I says—but that was after I had made the statement that if we had over thirty per cent of the signatures and he asked me if—we have already gone through that—he says, “Go ahead and have your election.” And he says, “That is when our good relations will cease, when you have an election.”

Q. And is that all of the conversation, as you remember it?

A. That is the conversation as I remember it.

Q. Now, did you have any further conversation with Mr. Zall between October 3, 1950, and this morning?

A. I have not.

(Testimony of Cecil F. Gamble.)

Q. Now, did you thereafter file a petition with the National Labor Relations Board?

A. I filed a petition for recognition on the—December 4.

Q. December?

A. I have it there in my files, but the date has just slipped me. October the 4th, because it was right after this that I had met Mr. Zall that I filed for a petition for an election.

Mr. Fuidge: What was the balance of that answer?

(Answer read.)

The Witness: Yes, it was October 4th.

Q. (By Mr. Law): Was that in Case No. 20-RC-1171? A. Yes, sir.

Mr. Law: I don't know that any purpose is served by offering a copy of the petition.

Mr. Fuidge: Well, I frankly never heard of it before. Have we ever received any notices of filing such a petition?

The Witness: I received mine.

Mr. Law: I don't know whether you did or not.

Q. (By Mr. Law): Did you subsequently withdraw the petition? A. I did.

Q. Do you know about when you withdrew it?

A. You've got me; I've for the—I've got the date there, [47] right over there in my file.

(Discussion off the record.)

Trial Examiner Miller: On the record.

(Testimony of Cecil F. Gamble.)

Q. (By Mr. Law): I have shown you a copy of a document which I have also shown to counsel; does that refresh your recollection as to when you withdrew the petition? A. That's right.

Q. In Case No. 20-RC-1171?

A. That's right.

Q. When did you request withdrawal of the petition? A. October 16th, 1950.

Mr. Law: I will now offer in evidence General Counsel's Exhibit 3 for Identification, that is the master agreement proposed contract.

Trial Examiner Miller: Is there any objection?

Mr. Fuidge: Well, I am inclined to think that the whole thing is incompetent, irrelevant and immaterial in view of Mr. Gamble's testimony to the effect—well, the effect of it is up to you; I object to it on that basis, that it is incompetent, irrelevant and immaterial, at this stage.

Trial Examiner Miller: Objection overruled. General Counsel's Exhibit 3 will be received.

(The document referred to as General Counsel's Exhibit No. 3 for Identification was received in evidence.)

(Testimony of Cecil F. Gamble.)

GENERAL COUNSEL'S EXHIBIT No. 3

Master Agreement

Between

.....

and

The American Federation of Grain Millers

(A. F. of L.), Local Union Number ....

Relating to the Company's Plant at

.....

Effective from ....., 19..., to ....., 19...

Preamble

1. Parties

The parties to this agreement are the Company, ....., and the Union, American Federation of Grain Millers (AFL), including the International Union and each of its Local Unions whose name and number appears as one of the signatories.

2. Nature of the Agreement

This Master Agreement and the Supplemental Agreement to be negotiated, as provided in paragraph 8, shall be considered the collective bargaining agreement between the parties for such bargaining unit. The terms and conditions of the Supplemental Agreement shall be binding on the parties thereto regardless of the continuation or termination of this master agreement, and the

(Testimony of Cecil F. Gamble.)

terms and conditions of this Master Agreement shall be binding on the parties regardless of the continuation or termination of any Supplemental Agreement.

3. This contract represents the agreement reached between the parties as a result of having collectively bargained in respect to rates of pay, wages, hours of employment, and other conditions of employment, and its purpose is to promote and insure harmonious relations and understanding between the Company and its employees. To that end the Company pledges itself to give its employees considerate and courteous treatment, and the employees, in turn, pledge themselves to render the Company loyal, efficient, and cooperative service.
4. In consideration of these premises and the mutual promises of the respective parties herein contained, the parties hereto mutually covenant and agree to and with each other as follows:

#### Section I. Recognition

5. The Company recognizes the Union as the sole collective bargaining agent for its employees in those of the Company's plants or other appropriate collective bargaining units wherein a majority of its employees have designated the Union as their bargaining representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or



(Testimony of Cecil F. Gamble.)

other conditions of employment; provided, however, that this recognition shall not apply to employees in other recognized bargaining units or to employees whose duties and responsibilities classify them as supervisors, buyers, salesmen, and employees taking the Company's regular training course for supervisory service, provided, however, that trainees doing work to learn a job shall in no way displace or otherwise disturb the status of a regular employee who would normally work the job.

6. The Union agrees with the Company that this agreement shall apply to the Plant(s) or other appropriate bargaining units shown hereon, or as the same may be amended or extended by the parties hereto.
7. All employees covered by this agreement who have completed their probationary period shall, as a condition of employment, become and remain members of the Union in good standing for the life of this agreement.

Admitted January 30, 1951.

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Mr. Law: I might state that General Counsel's Exhibit 3 is [48] offered primarily for the purpose of establishing a part of the request to bargain. And as I attempted to make clear, there was no claim that Mr. Zall ever agreed to the contract.

Mr. Fuidge: I appreciate that, Mr. Law; with-

(Testimony of Cecil F. Gamble.)

out me judging the case myself, I would say that at this stage it is incompetent, irrelevant and immaterial.

Trial Examiner Miller: Well, my ruling on that stands.

Mr. Law: All right.

Trial Examiner Miller: Well——

Mr. Fuidge: I waive my remarks on the subject, but not my objection, of course.

Trial Examiner Miller: Well, the record is clear, and if I have not expressed my ruling at this point, I would say that General Counsel's 3 would be accepted in evidence.

Mr. Law: I will now offer General Counsel's Exhibit 4 in evidence. That is the authorization application for membership cards signed by Jess Stovall.

Mr. Fuidge: I make the same objection.

Trial Examiner Miller: Overruled.

General Counsel's No. 4 will be received.

(Whereupon the document heretofore referred to as General Counsel's Exhibit No. 4 for Identification was received in evidence.)

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#### GENERAL COUNSEL'S EXHIBIT No. 4

Application Date: September 12, 1950.

Authorization and  
Application for Membership

I, the undersigned, an employee of Sam Zall Milling Company, hereby make application and

(Testimony of Cecil F. Gamble.)

authorize the American Federation of Grain Millers (A. F. of L.), or its affiliated Local Union No. (Pending), its officers or representatives to represent me from the date herein set forth in the matter of Collective Bargaining with respect to hours of labor, wages, tenure of employment, and other terms and conditions of employment as provided by the National Labor Relations Act.

Name: Jess Stovall.

Address: P. O. 1625.

City: Yuba City.

Telephone No.: 33113.

State: Calif.

Amount of Initiation Fee: \$5.00.

Date Initiated: .....

/s/ JESS STOVALL.

Signature of Applicant.

/s/ C. F. GAMBLE,

Signature of Union  
Representative.

Admitted January 30, 1951.

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Mr. Law: I will offer General Counsel's Exhibit 5, sub parts a to d, inclusive, sub part a being the authorization [49] application for membership card signed by Charles H. Adams; sub part b being the

(Testimony of Cecil F. Gamble.)

similar card for Otis Matthews; sub part c being the similar card for Ernest C. Curt; sub part d being the similar card for R. C. Skinner. I now offer General Counsel's Exhibit 5 and sub parts mentioned in evidence.

Mr. Fuidge: Subject to the same objection.

Trial Examiner Miller: For the record, that objection is overruled. General Counsel's Exhibit 5, sub parts a to d, will be received in evidence.

(Whereupon the documents heretofore referred to as General Counsel's Exhibit 5, a to d, for Identification, were received in evidence.)

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## GENERAL COUNSEL'S EXHIBIT No. 5-A

Application Date: October 2, 1950.

### Authorization and Application for Membership

I, the undersigned, an employee of Sam Zall Milling Company, hereby make application and authorize the American Federation of Grain Millers (A. F. of L.), or its affiliated Local Union No. (Pending), its officers or representatives to represent me from the date herein set forth in the matter of Collective Bargaining with respect to hours of labor, wages, tenure of employment, and other terms and conditions of employment as provided by the National Labor Relations Act.

(Testimony of Cecil F. Gamble.)

Name: Charles H. Adams.

Address: Gen. Del., Sutter City.

City: Sutter City.

Telephone No.: .....

State: California.

Amount of Initiation Fe: .....

Date Initiated: .....

/s/ CHARLES H. ADAMS.

Signature of Applicant.

/s/ C. F. GAMBLE.

Signature of Union  
Representative.

Admitted January 30, 1951.

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GENERAL COUNSEL'S EXHIBIT No. 5-B

Application Date: October 2, 1950.

Authorization and  
Application for Membership

I, the undersigned, an employee of Sam Zall Milling Company, hereby make application and authorize the American Federation of Grain Millers (A. F. of L.), or its affiliated Local Union No. (Pending), its officers or representatives to represent me from the date herein set forth in the matter of Collective Bargaining with respect to hours of labor, wages, tenure of employment, and other

(Testimony of Cecil F. Gamble.)

terms and conditions of employment as provided by the National Labor Relations Act.

Name: Otis A. Matthews.

Address: P. O. Box 463.

City: Olivehurst.

Telephone No. 37067.

State: California.

Amount of Initiation Fe: .....

Date Initiated: .....

/s/ OTIS MATTHEWS.

Signature of Applicant.

/s/ JOHN R. HANIFIN.

Signature of Union  
Representative.

Admitted January 30, 1951.

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GENERAL COUNSEL'S EXHIBIT No. 5-C

Application Date: October 2, 1950.

Authorization and  
Application for Membership

I, the undersigned, an employee of Sam Zall Milling Company, hereby make application and authorize the American Federation of Grain Millers (A. F. of L.), or its affiliated Local Union No. (Pending), its officers or representatives to represent me from the date herein set forth in the matter of Collective Bargaining with respect to hours of

(Testimony of Cecil F. Gamble.)

labor, wages, tenure of employment, and other terms and conditions of employment as provided by the National Labor Relations Act.

Name: Earnest C. Curt.

Address: 296 Woodbridge Av.

City: Yuba City.

Telephone No. None.

State: California.

Amount of Initiation Fee: .....

Date Initiated: .....

/s/ EARNEST C. CURT.

Signature of Applicant.

/s/ C. F. GAMBLE.

Signature of Union  
Representative.

Admitted January 30, 1951.

---

GENERAL COUNSEL'S EXHIBIT No. 5-D

Application Date: October 2, 1950.

Authorization and  
Application for Membership

I, the undersigned, an employee of Sam Zall Milling Company, hereby make application and authorize the American Federation of Grain Millers (A. F. of L.), or its affiliated Local Union No. (Pending), its officers or representatives to represent me from the date herein set forth in the matter

(Testimony of Cecil F. Gamble.)

of Collective Bargaining with respect to hours of labor, wages, tenure of employment, and other terms and conditions of employment as provided by the National Labor Relations Act.

Name: R. C. Skinner.

Address: 409 4th St.

City: Marysville.

Telephone No.: .....

State: California.

Amount of Initiation Fee: .....

Date Initiated: .....

/s/ R. C. SKINNER.

Signature of Applicant.

/s/ C. F. GAMBLE.

Signature of Union  
Representative.

Admitted January 30, 1951.

---

Trial Examiner Miller: What arrangements are going to be made with regard to production of duplicates?

Mr. Law: I intend to prepare copies. Mr. Examiner has given me blank forms. The copies in this case are not yet prepared. I would like to do that during the noon recess. I will attempt to supply Mr. Fuidge with copies.

Trial Examiner Miller: I would like to have our duplicate file complete, and if it isn't too difficult



(Testimony of Cecil F. Gamble.)

for Mr. Law, I would appreciate it if he could do it during the noon hour.

Mr. Law: I have no further questions of Mr. Gamble.

Trial Examiner Miller: At this time we will recess for the noon hour. I think we will go off the record for a moment to discuss the amount of time that would be appropriate for the [50] purpose.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Very well, at this time we will recess the hearing until 1:45.

(Whereupon, a recess was taken until 1:45 p.m.) [51]

(Whereupon the hearing was resumed, pursuant to the taking of the recess, at 1:45 p.m.)

Trial Examiner Miller: The hearing will be in order.

Had you completed your direct examination, Mr. Law?

Mr. Law: Yes, I had.

Trial Examiner Miller: Before we proceed to cross-examination, I will ask that we clear up the matter of duplicates in the General Counsel's exhibits. Four and five, a to d, which I see you are about ready to offer.

Mr. Law: Yes. I now have duplicates prepared

(Testimony of Cecil F. Gamble.)

and will present them and a set of copies for Mr. Fuidge.

Trial Examiner Miller: Very well. The record shows that the duplicates of General Counsel's 4 and 5, a to d, inclusive, have been received in evidence.

Mr. Law: I have no further questions of Mr. Gamble.

### Cross-Examination

By Mr. Fuidge:

Q. Mr. Gamble, I take it for granted that your union has complied with the regulations and rules concerning filing non cumulus affidavits and so on.

Now, when you and Mr. Hanifin were engaged—were in this project together, were you?

A. Yes.

Q. Were you in the—together at all times in the various visits? [52]

A. Most major points on signing of the affidavits, the authorization cards, yes. There might have been one or two times that Mr. Hanifin just went by to visit or to say hello or something like that. The official business was done in the presence of Mr. Hanifin.

Q. This was, I take it, your promotion?

A. It was the international promotion.

Q. I mean, you were in charge of it?

A. We were appointed at the same time and Mr. Hanifin was appointed due to my recommendation.

Q. As an assistant to you?

A. That is right.

(Testimony of Cecil F. Gamble.)

Q. Now, when you first went into the plant, which would be sometime around the 26th of September, Mr. Hanifin was with you at that time, was he?

A. Yes, sir.

Q. Did you make yourselves known at the office?

A. First place was the office.

Q. And did you contact Mr. Zall at that time?

A. That's right.

Q. And you told him that you were attempting to organize the men?

A. That's right.

Q. And did you inform him that you intended to contact them on the premises? [53]

A. No.

Q. At any time did you see Mr. Zall in and about the premises when you were engaged in your organizational work?

A. No.

Q. And do you know whether or not Mr. Zall knew that you were engaged in your business at any time prior to September 26th of 1950?

A. I have a general knowledge of it.

Q. What do you base that statement on?

A. From the report—you are speaking of after the first meeting, is that what you have reference to?

Q. Let me see if I have my dates correct. I understood your testimony to be that you had seen Mr. Zall around the 26th of September for the first time, is—in the plant, the office of the plant of his company with Mr. Hanifin?

A. Right.

Q. Now, prior to that time had you been on the premises in contact with any of the men?

(Testimony of Cecil F. Gamble.)

A. One, just as an invitation to be present at the hotel.

Q. That was to Mr. Stovall, wasn't it?

A. Right.

Q. And Stovall came down to the hotel on the, I think you testified the 18th of September and that is when you signed him up? A. Right. [54]

Q. The charge actually bears the date of December 12, 1950?

A. It could have been the 12th.

Q. That would refresh your recollection?

A. It could have been the 12th, my mind is not—I was strictly going by memory at the time. I have the record here in my file but I do not have the exact date. Whatever the card says is the date we signed him up.

Q. And you met Stovall first at the plant, in the plant, is that correct? A. Right.

Q. You and Mr. Hanifin together?

A. Right.

Q. And talked to him about this proposition?

A. No, we invited him.

Q. Did you tell him who you were?

A. Right.

Q. And did you tell him what you had in mind?

A. Not at that time, he knew.

Q. How did he know?

A. He evidently received some information from some of the boys at the General Mills plant.

Q. You had had a contact then with Stovall before? A. I did not, no.

Q. Who did?

(Testimony of Cecil F. Gamble.)

A. The boys in the General Mills plant were contacted, you [55] might say to get familiar with an idea of what was taking place under the jurisdiction of it.

Q. General Mills, as I take it, has a contract with your organization?

A. General Mills at Marysville has a contract with the Teamsters. That is, the local I do not know.

Q. I see. And through friendship or otherwise with some member of the Teamsters, Stovall was approached at your request—on your behalf with reference to an organization program, is that right?

A. Stovall was recommended to us to contact as the most reliable source to start our organizing campaign.

Q. In Zall's plant too, the recommendation came from one of the men from the General Mills plant?

A. Right.

Q. Here in Marysville?

A. In Marysville.

Q. So when you walked into the plant, you introduced yourself and Mr. Stovall—yourself and Mr. Hanifan to Mr. Stovall, told him who you were and suggested that he meet with you at the Marysville Hotel that evening?      A. Right.

Q. This was during business hours, was it?

A. Right.

Q. Now, what time of day was it that you met Stovall at the [56] plant?

(Testimony of Cecil F. Gamble.)

A. If my memory serves me right, it was in the afternoon around 3:00 o'clock. I just have no definite—I could not swear to it one way or the other.

Q. And what time was it when you met him at the hotel?

A. Around 8:00 o'clock in the evening.

Q. And what was the subject of the conversation at that time?

A. Collective bargaining.

Q. I beg your pardon?

A. Collective bargaining, and signing of the authorization cards.

Q. Collective bargaining. You are indicating to me by that that you talked to Stovall with reference to the possibility of organizing the Sam Zall Milling Co., right?

A. Right.

Q. Insofar as any collective bargaining is concerned, there had been no approach to Sam Zall at that time, had there?

A. Not at that particular time.

Q. Now, how long were you with Mr. Stovall that evening?

A. If my memory serves me right it was around—we went to the show, he came up around—I think we met him in the lobby about a quarter to eight. We went up to the room in the Marysville Hotel and we stayed there until approximately 9:00 or 9:30.

Q. Did you have anything to drink?

A. We had a little refreshment, yes. [57]

Q. Alcoholic in nature?

A. I can't prove that.

(Testimony of Cecil F. Gamble.)

Q. Don't you remember?

A. No, I don't. I was not intoxicated.

Q. I didn't say that, I am not indicating it.

A. Well, that is for the record.

Q. I am asking you whether or not you had something alcoholic to drink.

A. I have no proof—stated that there was a certain percentage of alcohol in the drink, yes.

Q. Whiskey? A. No.

Q. Gin? A. Wait a minute, may I—

Q. Just a minute, I am asking you a question.

A. All right, it was whiskey.

Q. And Stovall had some too, did he?

A. That's right.

Q. Did he impress you as being a good drinking man? A. Very sociable.

Q. Did you make it clear to Mr. Stovall that this particular time, what you had in mind when you offered him this card for his signature was that he was making an application for membership in this Union? A. Right, an authorization to. [58]

Q. And that he was also authorizing your Union to bargain on his behalf? A. Right.

Q. Was there anything said about an election at that meeting?

A. We discussed the procedure of the Board. Not to my knowledge. Of the procedure of elections as far as the National Labor Relations Board was concerned.

Q. Let me ask you, was there anything said that the fact of his signature to this card was that there

(Testimony of Cecil F. Gamble.)

should be an election held as to whether or not your organization or some other organization would represent the employees?

A. Definitely so. That is the procedure of our organization, and it is the purpose of our Recognition Card, is to gain their signature for their God-given right to authorize us to petition for an election in the courts of the law.

Q. Now, tell me what you told him about that?

A. I told him that that would be the procedure.

Q. That there would be——

A. We had to have the cards. We had to have their signatures.

Q. For an election?                      A. For an election.

Q. I see.

Then about the twenty-sixth of September, you went in to see Mr. Zall and with Mr. Hanifin and you told him who you were, and at that time you offered him in your words, for his [59] “study and approval,” this master agreement, Government’s Exhibit No. 3. Did you not?

A. I presented him with that contract for the purposes of collective bargaining.

Q. Now, did you tell him that this was for his approval?                      A. That’s right.

Q. Indicating by that that it was to be accepted if its form and if no other matter——

A. It was to be negotiated, to use my words, “We will discuss his financial status in accordance to the Master Agreement.”



(Testimony of Cecil F. Gamble.)

Q. Now, explain that to me?

A. In some of our agreements, holidays are considered as a cost item which we know.

Retroactive pay is considered in a good many cases as a cost item.

And vacations are considered as a cost item.

The call-in time is considered as a cost item. And that is what I meant.

Q. Where does that tie in with his financial standing. Tie that in with this agreement?

A. Wages are not necessarily a bargaining item. They are in a sense. But you have other conditions that must be applied to the cost of an operation.

Q. Do you take into consideration whether the employer is not, is able to go into that sort of a proposition? [60]

A. That's what I meant.

Q. You have straightened me out on that all right.

And at the time, this particular date of October 26, 1950, you then had only Mr. Stovall signed up? That is correct, is it not?

A. At our first—signature was Mr. Stovall, yes.

Q. That is the one—

A. That we signed in the hotel?

Q. Yes.

A. And as for the date. I don't remember the date.

Q. Thank you. We will take a look at the card, if there is any question.

A. Well, there is no objection.

Q. And I think you told Mr. Law that when

(Testimony of Cecil F. Gamble.)

Government's Exhibit No. 3 was presented to him on that day, the blanks were not completed.

For it says, "This Agreement shall become effective when the (blank) day of 19 (blank), shall be operative, and shall remain in force, until the first day of (blank), 19 (blank)."

Those blanks were blank, were they not?

A. They were blank in the contract.

But why did I ask the question of the study and approval?

Q. I am asking the questions, Mr. Gamble?

Your answer to my question was that these blanks, as they appear in Government's Exhibit No. 3 were not completed when [61] you handed him the contract for his study and approval on September 26, 1950?

A. That's right.

Q. And on that day, there was no refusal of any kind by Mr. Zall to undertake the consideration of the agreement you handed him?

A. He said that he did not need a labor organization in his plant, nor neither did his men. And I determined that that was a refusal to bargain.

Q. On September 26, 1950?

A. He made that statement, yes.

Q. I understood your testimony to be that the blanks shown in the contract were blank. That you did not go into any discussion. That Mr. Zall said **he would study it, and for you to drop back in a week or so, and if he liked it, he would make an appointment with you at that time, and that was all.**

(Testimony of Cecil F. Gamble.)

Now, is that the way the conversation went on the twenty-sixth?

A. He made the statement that he did not need an organization at the first meeting.

He made the statement that he did not need a labor organization or a union in his plant, and neither did his employees.

And, he reaffirmed his position at our second meeting.

Q. Well, do you remember on your direct examination this morning that you gave the testimony that I just reported to [62] you?

A. That's right.

Q. All right.

And do you remember that when you said that that was all, that Mr. Law then asked you another question as to whether or not you had anybody signed up, you said you had one man, Stovall, and you had a recognition card from him. That you had not contacted the other employees. And that that was the sum and substance of your conversation with Mr. Zall on the twenty-sixth?

A. Mr. Zall did not know anything about the authorization card that I had signed from Mr. Stovall.

Q. I didn't ask you that Mr. Gamble.

I asked you, or, what I am asking you again. In addition to these things that you testified to this morning on direct examination. Now, do you now tell us that on September 26th, in addition to those things that Mr. Zall said he did not want a Union or any——

(Testimony of Cecil F. Gamble.)

A. That's right. That was on the first visit.

Q. That was on the first visit?

A. That's right.

Q. What was your testimony this morning directed to when you said he said he would study it and to drop back in a week or so and that he would talk to you about it, and give you an [63] appointment?

Mr. Law: Well, if I may object there.

I object that it is argumentative.

I asked the witness what was said. It seems to me now the inquiry is going into his reasons.

Mr. Fudge: I submit that it is cross-examination, and Mr. Gamble is now giving us an additional element as to this conversation which I didn't hear about on direct examination.

Trial Examiner Miller: Well, off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

I will overrule the objection.

Q. (By Mr. Fudge): Was your statement before us this afternoon, Mr. Gamble that Mr. Zall on the twenty-sixth of October, tell you that he didn't need a union, and didn't want it, or words to that effect.

What did you have in mind when you said this morning in your direct examination that when you presented the contract to Mr. Zall, he told you that he would study it, and to drop back in a week or so, and if he liked the agreement, he would make an

(Testimony of Cecil F. Gamble.)

appointment with you at that time to discuss it?

A. If I am not too far out of my thought, I think I stated in the first opening remarks this morning that our first meeting with Mr. Zall. That he included in his statement or, I included in his statement that he had no need of a union, or, it may not be just exactly that wording, or his employees did not need a [64] union in that establishment.

Q. You did say something like that. You said that Mr. Zall said that the plant was like a family?

A. Right.

Q. And when he had troubles, he went out and adjusted it. He said, "I don't want a union. My people don't need a union."

However, what I am asking, is this: With reference to your testimony this morning, that you were to drop back in a couple of weeks, you didn't consider this meeting of October the 26th as an end of everything, or a refusal to bargain, did you?

A. If Mr. Zall had not made the statement that he did make, I would have presented him with the contract, and we would have started our negotiations as soon as the date could have been set.

Q. I am sorry, that is not what I asked you.

The question I put to you was this, and you can give me a yes or no on it.

When you walked away from the plant on the twenty-sixth of October, 1950, you did not consider the negotiations were at an end, did you?

(Testimony of Cecil F. Gamble.)

A. Truthfully, I cannot say that I expected negotiations at that time.

Q. But you were intending to come back and try again?      A. After his study and approval.

Q. All right.

Now, subsequently you tied up Adams, Mathews, Curt, and Skinner.

Were these men all contacted——

A. What do you mean by “tying them up”?

Q. Did you sign them up?

A. Sign them up.

Q. Sign them up.

And I take it again that these contracts were made at the plant?

A. We had three made at the plant as far as the signatures are concerned.

Q. You talked to all four men at the plant. On the floor of the plant. The plant premises.

A. One man had gone home. Mathews had gone home when we were in the plant at that time, we did not get to discuss it with him. We spoke to Chuck Adams, Earnest Curt, and Skinner.

Q. At the plant?      A. At the plant.

Q. On the premises?      A. Right.

Q. In working hours?      A. That's right.

Q. And let's see. These men also met you at the hotel, did they not?      A. Who? [66]

Q. Adams, Curt and Skinner?

A. Skinner has never been to the hotel. Curt has never been to the hotel. Adams has been to the hotel.

(Testimony of Cecil F. Gamble.)

Q. Well, now let me ask you a straight question.

When and where did you secure these membership cards from Adams, Curt and Skinner and Mathews?

A. The first three that you mentioned——

Q. Adams, Curt and Skinner.

A. ——were on the premises of Sam Zall's mill.

Q. During working hours?

A. During working hours.

Now, what was the next one?

Q. Mathews.

A. Mathews was at our room in the hotel. Mathews was on the same day, October 2nd.

Q. Then the next day, you and Mr. Hanifin went back out to the plant and met Sam Zall outside of the office. That is, inside the premises, but outside the office?

A. Just outside the door of his office, as near as my recollection——

Q. And he walked out on the sidewalk?

A. That's right.

Q. And at that time he asked you who you had signed up—right?

A. He asked me if I had thirty per cent.

Q. Did he ask you for the names of the [67] men?

A. He said, "Let me see them." The cards, that's what he meant.

Q. Did he ask you for the names of the men that you had signed up?

(Testimony of Cecil F. Gamble.)

A. He did not ask me for the names, he asked me to see the cards that I had signed up.

Q. And you refused to show them?

A. I did not refuse. I said, "Oh, no, that is for the jurisdiction of the Board," or words to that effect, and if they so desire, that is another matter.

Q. Well, don't you ordinarily show an employer that you are attempting to organize your authority to deal with them?

A. That goes into a history of several cases. Ordinarily, no.

Q. Ordinarily, no?           A. Right.

Q. Then the employer is required to take your authority on faith, you might say?

A. We——

Mr. Law: I object to the question.

Mr. Fudge: Withdraw it.

Q. (By Mr. Fudge): You go to a man and tell him that you are representing his employees and that you are prepared to bargain with him on their behalf, and you do not show them your authority by way of these authorization sign-up cards [68] before you deal with him, is that right?

A. We generally write a communication to the employer, in this case it was not so, stating the fact that we represented a majority of their employees, and requesting a meeting for the purpose of collective bargaining, and, at their earliest convenience, that a meeting will be set for a discussion of this particular bargaining discussion.



(Testimony of Cecil F. Gamble.)

We in turn receive, or do not receive a letter of recognition of our petition to the employer.

It is customary with our International to sign the cards and to refer them to the Board, and if the Board so sees fit to expose those cards, that is their prerogative.

Q. Well, I do not follow you.

Do you start these things in mind that you are going to have a hearing before the Labor Relations Board, and, never mind about negotiating with the client, I mean the employer?

A. That is one reason why I went to see Mr. Zall the second time. I asked him the question if he would recognize us if we had the thirty per cent. He said, "Have you got them?" and I said, "Yes," and he said, "Let me see them," I said, "Oh, no, the Board——" and we had already filed a petition with the Board.

Q. You had filed a petition with the Board?

A. No, that's a misstatement.

At the meeting, the second meeting, we had not filed with the Board, but on the fourth day of October we filed with the [69] Board.

I had the cards in my possession at that time, and it is customary to send the cards, the authorization cards with the application forms for an election.

Q. Well, let's you and I understand each other. You had these cards in your pocket, or possession. In your briefcase, or in your office?

A. I did.

Q. And Zall asked you to take a look at them,

(Testimony of Cecil F. Gamble.)

and you said, "No."                   A. That's right.

Q. That's right?                   A. I had a reason for it.

Q. And you immediately went to the Board and filed a petition for an election?                   A. Right.

Q. And why did you do that?

A. Due to the fact of the unfair labor charges that we had so filed.

Q. You did not file that until——

A. That's why we withdrew our petition for an election.

Q. You didn't file that until the eighteenth of October, did you?

A. Well, whatever the record says there. You have the date. I have it here in my file, but it's not customary to look at [70] my file during cross-examination.

The date kind of misses me.

Q. So, in any event, we can say that on October 3rd, the last time you talked to Mr. Zall you had come to the place where you had to go to the Board?

A. Yes.

Q. You mean the National Labor Relations Board?                   A. Yes.

Q. You had been there once before, had you not?

A. Right.

Q. Now, when you signed these men, Mathews, Adams, Curt and Skinner up, was there something said about an election being held, as between your organization and the employer, or any other organization for the purpose of representation?

A. That's right.

(Testimony of Cecil F. Gamble.)

Q. You did not tell these men that that's what this was for, did you, Mr. Gamble?

A. That's right.

Q. You did, or you did not? A. I did.

Q. You did tell them?

A. I told them that that's the recognition for purposes of obtaining an election. And also the membership cards.

Q. And you also indicated that you were getting them so that there could be an election? [71]

A. Right.

Mr. Fuidge: I think that's all.

#### Redirect Examination

By Mr. Law:

Q. Did you tell the employees that the only reason for the cards was to obtain an election?

A. No. It was for an application for membership.

Mr. Law: No other questions.

Mr. Fuidge: I have no further questions.

Trial Examiner Miller: You may be excused.

(Witness excused.)

Mr. Law: I will recall Mr. Zall as an adverse witness.

## SAM ZALL

a witness called by General Counsel, having been previously sworn, resumed the stand, and was examined and testified further as follows:

## Direct Examination

By Mr. Law:

Q. Mr. Zall, you have heard Mr. Gamble's testimony, have you? A. Yes.

Q. Did Mr. Gamble in fact see you on two different occasions? A. Yes.

Q. Once in September, and once in October?

A. Yes.

Q. All right. Now, after the second meeting with him in [72] October, did you have any conversations with any of the employees that is, exclusive of Mrs. Miles or Mr. Cotton or the salesman, Mr. Darchuk. Did you have any conversations with any of the other employees with respect to their activities or affiliations with the Union?

A. I don't believe I did.

Q. You had no conversations with the men at all?

A. Nothing specific. I may have had conversations with them, because I talk to them every day when I am around them.

Q. Well, did you not in fact——

A. I don't recall any definite conversation specifically about the Union.

Q. Well, did you go to a number of employees and ask them if it was true that they had signed cards for the Union?

(Testimony of Sam Zall.)

A. It's possible that I did after talking to Mr. Gamble and not knowing for sure whether he had them signed up or not.

I may have asked the various men if they had actually signed up.

Q. Well, you did ask them in fact, did you not?

A. Yes. I believe I did.

Q. Do you remember how many you asked?

A. No, I don't.

Q. Now did you thereafter have a meeting with your employees in the plant or with any of them to discuss entering into a contract directly between themselves and you covering wages and [73] hours?

A. No, I didn't.

Q. You say you didn't have such a meeting?

A. No.

Q. Were you present at any meeting while Mr. Cotton discussed the contract directly between yourself and your employees?

A. I was present at one conversation after the contract had been presented to me on my desk.

It was on my desk and Mr. Cotton was taking it up with the men, and I happened to be going through and talked about it, and I happened to be going through and stopped, and he asked me several questions, which I answered.

That was regardless of having this put on my desk, but I didn't call the meeting or have anything to do with calling it.

Q. I will show you again a document which I showed to you during the recess, and ask you if

(Testimony of Sam Zall.)

that is a copy of the contract which you ultimately did enter into with certain of your employees?

A. Yes.

Q. And when did you sign that contract? The original?

A. Oh, gee, I couldn't tell you that. But at the time it was drawn up, it was put on my desk signed by the men, and I signed it.

Q. Was it signed by the men before you signed it? A. As good as I can remember, it was.

Q. And which men signed it? [74]

A. Well, I've got the original copy here; I can tell you better that way, if I may look at it.

Jess Stovall, Earnest Curt, R. C. Skinner, Charles Adams and Otis Mathews.

Q. Those men signed on the right-hand side of the sheet, did they? A. That's right.

Q. And you signed where?

A. On the left. Lower left.

Trial Examiner Miller: May I have those names again, please?

The Witness: Jess Stovall, Earnest Curt, R. C. Skinner, Charles Adams, and Otis Mathews.

Mr. Fudge: If Mr. Law would like to complete his copy there with those names, I would more or less stipulate that it is a copy of the contract in question.

Mr. Law: I think that might be a good suggestion. We can do that in the next recess as to the names.

(Testimony of Sam Zall.)

Mr. Fuidge: Mr. Law, would you like to examine the original?

Trial Examiner Miller: Let the record indicate that Mr. Law has inspected the original.

Q. (By Mr. Law): Now, from your recollection, Mr. Zall, how did this contract come to be executed?

What part did you have in its execution? [75]

A. I didn't have any part in the execution. As near as I can find out, the men had taken it up entirely with Mr. Cotton.

This particular contract—however, I might add that for at least three months we had been negotiating back and forth, the men and myself, and Mr. Cotton, toward a contract of this nature, either verbal or written. So, it wasn't something that was just brought up on the spur of the moment.

Q. Well, you did then have conversations with the employees about a contract of this nature before the execution of General Counsel's Exhibit No. 6 for identification?

Perhaps I haven't identified that on the record.

Trial Examiner Miller: You have not. No.

Let the record show, if it does not already show, that the document now under discussion by Counsel for the General Counsel that the witness has identified as General Counsel's Exhibit No. 6 for Identification.

(Thereupon, the above-mentioned document, General Counsel's Exhibit No. 6, was marked for identification.)

(Testimony of Sam Zall.)

Q. Did you have a conversation with the employees about a contract of this nature before the execution of General Counsel's Exhibit No. 6 for identification?

A. The only conversation I had were those conversations that had taken place prior to the time the Union Representatives had come on the scene, and those were mere generalities. [76]

Q. All right.

Now, with reference to General Counsel's Exhibit No. 6, for identification: Was that executed before or after your second meeting with Mr. Gamble and Mr. Hanifin?

A. I wouldn't want to say. I don't remember.

Q. Well, a few questions to complete the record with reference to the contract.

The opening sentence starts out: "Agrees to pay the same wages as General Mills."

To what General Mills does that refer?

A. General Mills in Marysville.

Q. And what is General Mills in Marysville?

A. General Mills is incorporated; it is a feed manufacturing establishment, owned by the General Mills, Incorporated.

Q. Now, did the execution of this agreement, that you pay the same wages as General Mills result in your giving an increase in the hourly rate to your employees as of October 2, 1950?

A. Yes. That was the point.

Q. And approximately, what was the amount of that hourly increase?



(Testimony of Sam Zall.)

A. I've forgotten. It seems to me that we had given a prior raise of two and a half cents. And this one was probably five cents, as I remember it.

Trial Examiner Miller: That would be five cents across the [77] board, as far as it——

The Witness: No. It seems to me—I believe that the grinder men got seven and a half cents more, and the mixer men got five cents more than the regular rate of pay.

Trial Examiner Miller: I beg your pardon.

The Witness: As his regular rate of pay.

Trial Examiner Miller: Do you know how much the other employees get?

The Witness: Than they had previously been receiving, you mean?

Trial Examiner Miller: Yes.

The Witness: As I say, I think we had previously given a two-and-a-half-cent raise, and that this was a five-cent increase. But I could stand corrected on that.

Trial Examiner Miller: Well, I don't know that the matter is material at this stage, but since it has been opened up, I might as well try to clarify it.

You spoke of the grinder men getting seven and a half cents.

The Witness: More than the regular employees. More than the regular—in other words, if one man got a dollar, grinder men got a dollar seven and a half.

Trial Examiner Miller: I see what you mean. You mean *that his* differential?

(Testimony of Sam Zall.)

The Witness: His differential was seven and a half cents.

Trial Examiner Miller: After this five-cent increase? [78]

The Witness: No. When the regular employees got a five per cent increase, the grinder men got a seven-and-a-half-cent increase.

Trial Examiner Miller: In other words, he would be the only one?

The Witness: The mixer man, I believe, got five cents. In other words, it was a dollar five, a dollar seven and a half cents.

Trial Examiner Miller: What about your take-off man, sack filler, and combination truck drivers and mill workers?

The Witness: Well, the men inside the mill, all got the same rate with the exception of these two classifications I have just told you about.

Truck men come under a different classification altogether, and they get a different rate. It's not covered on here but they—I believe they get six cents an hour more than the regular mill rate.

Trial Examiner Miller: Go ahead, Mr. Law.

The Witness: I might add that the truck drivers aren't included in this contract that I had with the men.

Mr. Law: Yes.

Trial Examiner Miller: My question was only because of the fact that you mentioned Skinner.

The Witness: Yes, but at that time, he wasn't a truck driver. [79]

(Testimony of Sam Zall.)

Q. (By Mr. Law): Now, I notice that further down in the contract the provision:

“At no time will an employee be cut off before his regular week is completed.”

Did that represent a change in prevailing practice with respect to termination of employees?

Mr. Fudge: What does “cut off mean”; fired?

The Witness: No.

Trial Examiner Miller: Will you explain what the term means then, and explain how, if at all, it varied from your previous practice?

The Witness: Well, as near as I can remember it, we worked on a forty-hour week from Monday to Friday, inclusive. And it was possible that when a man got his forty hours before Friday afternoon, he laid off when his forty hours were up, and in other words, he's cut off.

Trial Examiner Miller: That decision to lay him off, after he has put in forty hours, would be your decision, or Mr. Cotton's decision?

The Witness: Well, it was all of our decision. Because many times when the men worked for some reason or other wanted to work in the evening, and they would put in more hours than they should have for that particular day, and want to work in the evening, and they would put in more hours than they should have for that particular day, and by the end of the week they [80] would have had more than forty hours, if they had stayed until quitting time.

Trial Examiner Miller: What I meant was this.

(Testimony of Sam Zall.)

In the normal course of events, would the decision to cease work after putting in forty hours' work, be the decision made by the man, or made by the management?

The Witness: No, by the management.

The reason for that was that we tried to stagger all of the overtime to the point where every man got his fair share of overtime.

Q. (By Mr. Law): And did this contract represent any change in the situation which prevailed before execution of the contract?

A. Yes. There is a difference in the differential of the grinder man and the regular employees in the mill. A differential between the mixer man and the regular employees. A difference——

Trial Examiner Miller: Well, Mr. Law is speaking now with respect to the cut-off procedure.

The Witness: Oh, I see.

Trial Examiner Miller: That's the varying practice in the disposition in the contract with respect to cut-offs.

The Witness: Oh, yeah. That's varying the practice from the time we had the contract. It happened to be one of the things that we had talked about for three months, or several months. [81]

Q. (By Mr. Law): Now, there had also been previous discussions about the matter of calling in part-time employees, had there not?

Previous discussion between you and some of the employees? A. In what way?

Q. Did not some of the men ask that they be

(Testimony of Sam Zall.)

given overtime work if possible, rather than your calling in outside help?

A. That's one of the things they wanted in the contract.

According to Mr. Cotton, that is one of the things they had brought up all the time that the contract had been in negotiation, for two or three months.

Mr. Law: No other questions.

Mr. Fuidge: That's all.

Trial Examiner Miller: That's all. You may be excused.

(Witness excused.)

Trial Examiner Miller: At this time, we will recess for five minutes.

(Short recess.)

Trial Examiner Miller: The hearing will be in order. Off the record.

(Discussion off the record.)

On the record.

Mr. Law: Before calling the next witness, I will offer General Counsel's Exhibit No. 6 for identification in evidence.

Trial Examiner Miller: Is there any [82] objection?

Mr. Fuidge: No. Did I not stipulate that it was a true and correct copy? I believe so.

Trial Examiner Miller: Very well, General Counsel's Exhibit No. 6, pursuant to that stipulation will be received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 6 for identification, was received in evidence.) [83]

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(Copy)

GENERAL COUNSEL'S EXHIBIT No. 6

Contract between Sam Zall Milling Company and  
Employees

Contract

Agrees to pay the same wages as General Mills, except for Grinder Man and Mixer Man, which would have a fixed price of 10c per hour over for Grinder Man and 05c per hour over for Mixer Man.

Agrees that when General Mills receive a pay increase that we, in turn, will receive an increase amounting to the same.

Agrees that, as far as possible, all work that can be turned to the regular employees, even though it involves overtime, be done.

Agrees, that, at no time, will an employee be cut off before his regular week is completed.

Agrees that after an employee has been employed for 30 days he is to receive the same base pay as the other employees.

Agrees that all men will do, to the best of their ability, according to the best practices in a Feed Mill and that the Grinder Man and the Mixer Man will be responsible for keeping their area in the cleanest possible condition. That all machinery,

under their control, will be kept up with respect to oiling, greasing and repairing.

This agreement will be in effect from October 2, 1950, to October 2, 1951, with an option of renewal at that time.

The following signatures are hereto fixed in a sincere, honest and truthful manner.

/s/ JESS STOVALL,

/s/ EARNEST C. CURT,

/s/ R. C. SKINNER,

/s/ CHARLES ADAMS,

/s/ OTIS MATHEWS,

/s/ SAM ZALL.

Admitted January 30, 1951.

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Mr. Law: I will next call Otis A. Mathews.

OTIS A. MATHEWS

a witness called for and on behalf of General Counsel, after first being duly sworn, was examined, and testified as follows:

Direct Examination

By Mr. Law:

Q. What is your full name for the record?

A. Otis A. Mathews.

Q. And what is your address?

(Testimony of Otis A. Mathews.)

A. Third and Oliver—Third and Canal, in Oliver, California.

Q. Are you employed by the Sam Zall Milling Company?      A. Yes, sir.

Q. How long have you been?

A. Oh, I don't know, about six—seven years next July.

Q. What is your present job?

A. Oh, I don't know. I have held a lot of them since I have been around there.

Q. What do you do most of the time?

A. I help Charley on the take-off mostly.

Q. Now, did you at any time have a conversation with Mr. Sam Zall with respect to the signing of a union card?      A. Yes. I was——

Q. When was that conversation?

A. I think that was afterwards.

Q. After?

A. I don't remember the date now. It was a little while [97] after.

Q. After what?

A. After I signed the union card here.

Q. Now, when was the conversation?

A. While I was throwing off barley there.

Q. And was there anyone present beside yourself and Mr. Zall?      A. No.

Q. All right. What did Mr. Zall say to you?

A. Well, he said, "Charley, did you join the Union or sign the card?" And I said, "Yes, sir, I did."

Q. Is that all of the conversation?



(Testimony of Otis A. Mathews.)

A. That's all I remember now.

Mr. Law: No more questions.

Cross-Examination

By Mr. Fuidge:

Q. Mr. Mathews, you signed the card with Mr. Hanifin, did you not?

A. Didn't I sign the card with you up there?

Q. This is Mr. Hanifin here, and Mr. Gamble here.

A. No, I didn't sign it when down at the mill.

Trial Examiner Miller: Let the witness indicate whether his memory has been refreshed.

(Witness' memory refreshed.)

The Witness: I didn't sign it at the mill; I went up there.

Q. (By Mr. Fuidge): At the hotel? [98]

A. Yes, at the hotel.

Q. Were Mr. Gamble and Mr. Hannifer in the room at the time, or was it Mr. Hannifer?

A. I think he was up there.

Q. Did you remember seeing Mr. Gamble?

A. Yes.

Q. This card that you signed Government's Exhibit No. 5(d)——

A. I didn't read it. My wife did.

Q. Well, this is your signature down here, is it not? A. It is my signature.

Q. Do you read? A. Yes, I can read.

Q. But your wife read this card to you?

(Testimony of Otis A. Mathews.)

A. Well, we read the whole works. We read all of them.

Q. What do you mean, you read all of what?

A. All of those cards that were signed up there.

Q. And when you signed this card, they had some other cards, is that what you mean?

A. Well, I seen that first. I wanted to see that first.

Q. You wanted to see who had signed before you signed?      A. Yes.

Q. And there were some other cards there, and you saw the men's names on them?      A. Yes

Q. So then you signed this card?

A. That's right.

Q. And Mrs. Mathews read this card to you?

A. She read all of them.

Q. She read them all?      A. Yes.

Q. And did she read this to you?

A. Yes—well, them—who was on them. She didn't read that card, but she read the rest of them.

Q. Well, now, Mathews—

A. Well, one of those other cards.

Q. Now, are you saying this to me that when you went up to the room you wanted to see who else had signed up?      A. Yes.

Q. So, either Mr. Gamble, or Mr. Hannifer handed you the cards and Mrs. Mathews went through them and looked at the names?

A. No, sir. They handed them to her. They gave her the cards to read and "That I want to see," is exactly the words I said.

(Testimony of Otis A. Mathews.)

Q. Well, what was Mrs. Mathews reading?

A. Well, I couldn't tell you now. I didn't remember.

Q. Was she reading them out loud?

A. Yes, sir.

Q. So she took them card by card and read each one?

A. No. She just read the names.

Q. That is what I asked you. That is what I wanted to know. [100]

A. That's right.

Q. She read the names off?

A. That's right.

Q. All right.

Now, then, neither Mr. Gamble nor Mr. Hannifer presented you with a card and you signed it?

A. That's right.

Q. Now, did Mrs. Mathews read that card?

A. No, she didn't read that card.

Q. Wait a minute. Let me ask you a question.

Did Mrs. Mathews read your card over to you before you signed it?

A. No.

Q. All right.

Now, then, did Mr. Gamble or Mr. Hannifer read it over to you before you signed it?

A. No.

Q. What did you understand you were signing when you signed this card?

A. Well, just like Charley, I figured we was going to have to go into a vote to see which one was going to win out.

Q. Which one of what?

A. Which Union, or the other one?

(Testimony of Otis A. Mathews.)

Q. Of what you said there was going to be a vote. Who said that? [101]

A. I am a little ahead on my vote there.

Q. All right. Get back of your vote there.

Do this for me, Mr. Mathews, take your time. You are amongst friends.

Tell me and tell the Examiner, what was said to you my either Mr. Gamble or Mr. Hannifer as to what it meant when you signed that card?

A. We had been talking about the Union down there for quite a while. It wasn't much said about what we belonged to. Because I knew that the application would be an application for the Union. But there wasn't much said about what was signed. But what I was signing I knew it was an application for the organization membership of this here Union.

Q. All right. Then when you signed this, you understood that you were applying for membership in the Union, is that right? A. That's right.

Q. And what followed from that was that there was to be an election. Was that your understanding? A. That's right.

Q. And if the Union had not succeeded in an election, what about your membership in that Union?

A. Well, I couldn't speak of that.

Q. You didn't think it out that far?

A. No. [102]

EARNEST CURT

a witness called for and on behalf of General Counsel, after being duly sworn, was examined, and testified as follows:

Direct Examination

By Mr. Law:

Q. What is your full name for the record, Mr. Curt?

A. Earnest Claude Curt. I spell that Earnest a little peculiar. E-a-r-n-e-s-t.

Mr. Law: I noticed that.

A. C-u-r-t.

Q. What is your address?

A. 296 Woodbridge Avenue, Yuba City.

Q. Are you employed by the Sam Zall Milling Company? A. Yes, sir. [103]

Q. How long have you worked for it?

A. About two and a half years.

Q. What is your job?

A. I'm the mixer man.

Q. Now, did you at any time have a conversation with Mr. Sam Zall about whether or not you had signed a union card?

A. How was that?

Q. Did you at any time ever have a conversation with Mr. Sam Zall about whether or not you had signed a union card? A. Yes, sir.

Q. When was that conversation?

A. Well, it was along about the third or fourth of October.

Q. Of what year? A. Of 1950.

(Testimony of Earnest Curt.)

Q. And where was the conversation?

A. Standing right close to the tracks there by the molasses tank.

Q. In the plant?           A. In the plant.

Q. Was anyone else present?           A. No, sir.

Q. What was the conversation that you had with Mr. Zall?

A. He asked me if I had signed a card with the Union. I first denied it, because it was my own—none of the other boys said they had signed it, so I went and told him that I had. [104]

Q. I was asking only about the conversation on that first occasion.

A. He just merely asked me if I had signed the card.

Q. And you told him at that time?

A. And I told him at that time that I hadn't.

Q. And was that all the conversation?

A. Yes.

Q. Now, later as I understand it, you went to him again and told him that you had signed it?

A. Yes, sir.

Q. When was the second time?

A. Oh, maybe twenty minutes later.

Q. What was your conversation with him on the second occasion? Twenty minutes later.

A. I went back to him and I told him that I had signed a contract. I had been told that he had said that if any man joined the Union——

Mr. Fudge: Just a minute. Can we have some foundation? This is hearsay, I think.

(Testimony of Earnest Curt.)

Q. (By Mr. Law): I am not interested in what you had been told before.

A. O.K. That ends it, then. I told him I had signed the card.

Q. What did he say, if anything?

A. I don't know if I can exactly remember what he said.

Q. I will show you a contract that has been received in [105] evidence as General Counsel's Exhibit No. 6, and I will ask you if you signed that?

A. Yes, sir. That's my signature.

Q. Yours is the second one?

A. Second one from the top.

Q. Do you remember when you signed it?

A. Not exactly. It was in the latter part of that week. The week beginning October 2. Along Thursday or Friday. I couldn't say for sure.

Q. Were any other people present when you signed it?

A. When I signed it?

Q. Yes.

A. Yes. There was three or four of us boys all standing there together, and we took turns about signing it.

Q. Now, before you signed it, did you have any conversation with Mr. Zall about the proposed contract?

A. He brought the other contract back. The one that Cotton had just sketched out, and read it to us.

Q. What had Mr. Cotton read?

A. Pardon?

(Testimony of Earnest Curt.)

Q. When had Mr. Cotton done this?

A. Oh, he had been working on it off and on all week. Just sketching it up, what he thought the boys wanted. And then when Mr. Zall come back, he brought the contract back and took it back to Mrs. Miles. I suppose for Mrs. Miles to copy after [106] he had read the contract to us and we had agreed that that was what we wanted.

Q. Who read it to you?

A. Mr. Zall read the contract.

Q. Do you remember whether Mr. Zall signed it before you did?

A. His signature was on it when the contract was brought back to us to sign.

Q. All right. Now, on that occasion did Mr. Zall and you or the other employees discuss the terms of the contract?

A. The terms of the contract?

Q. Yes.

A. You mean the length of the contract?

Q. No. I mean the provisions of the contract.

A. Yes, we talked about it there when he brought the contract back, and what our wages would be and this, that and the other and we all agreed that that was the way we wanted it.

Trial Examiner Miller: When you say, "We talked about it when he brought it back," are you referring to the time when he brought it out in the rough draft form, or when he brought it back in typewritten form with this signature?



(Testimony of Earnest Curt.)

The Witness: When he brought it back in the contract form, brought us.

Trial Examiner Miller: Before he took it away for typing?

The Witness: Yes.

Q. (By Mr. Law): Now, at the time you discussed the contract [107] with Mr. Zall, was anything said about an election?

A. I think at the time he said, "Now, boys, when the election comes, you know how I would like to have you vote."

Q. When was that?

A. That was while we were discussing the contract. He says, "If you sign this contract," he says, "then you boys know how I would like to have you vote."

Q. Did you or any of the others make any reply to him in that matter?

A. Not that I know of.

Mr. Law: No other questions.

### Cross-Examination

By Mr. Fuidge:

Q. Mr. Curt, during the period of a few months before Mr. Gamble and Mr. Hanifin appeared upon the scene, had there been some talk about an increase for the men? Hadn't there?

A. An increase in the men?

Q. An increasement of wages.

A. No, not between Mr. Zall and us. However,

(Testimony of Earnest Curt.)

sometime back a while before the contract was brought in, he did increase our wages two and a half cents an hour and to my knowledge there wasn't anybody ever asked him for the increase. I know I didn't.

Q. This was before you signed the card with Mr. Gamble and before you signed this [108] contract?

A. I think it was, yes, sir.

Q. You got that two-and-a-half-cent increase?

A. Two-and-a-half-cent increase.

Q. And before you got the two-and-a-half-cent increase, isn't it a fact that there had been some talk among the men about giving the pay scale to General Mills, and you fellows had been talking to Cotton about that?

A. As to that I can't say. I do know that the men all talked at different times about the wages General Mills gets and the wages we get. It quite often occurs that we all talk about that, but as far as to Cotton even discussing it, I don't know that he ever has.

Q. You've been there a couple of years, haven't you?

A. Yes, sir, with the exception of about 3 months last winter.

Q. And the other men have pretty steady employment records, too, don't they?

A. Yes, sir.

Q. What do you have? Seven, eight, nine men out there?

(Testimony of Earnest Curt.)

A. Oh, there's about six of us, I think, back in the mill.

Q. And you are all good friends amongst yourselves and with Cotton and with Mr. Gamble and Mr. Hanifin?

A. Yes, sir; as far as I know.

Q. And you men out there in the shops are talking about your jobs and how the business is run and the wages you get and the wages everybody else gets? [109]

A. That's the truth. I think you'll find that among any bunch of men.

Q. That's right. Now, as I understand the situation as you tell us, the thing finally came to a head and you had a talk with Cotton about what you'd like to have by way of wages.

A. Yes, sir.

Q. And then Cotton made himself some notes of some kind?

A. He would just make notes here and there and yonder as he had talked to the boys, 'til he finally——

Q. Finally got a——

A. Stumbled onto a plan he thought would work.

Q. Whipped it up into shape and talked it over with you boys out there in the shop, did he?

A. Well, if I remember right, we all talked about it out in the front one night after quitting time.

Q. All right; fair enough.

(Testimony of Earnest Curt.)

A. And he had told us what he was trying to get together and that he would see Mr. Zall and see what he thought about it.

Q. So he had it roughed out on some sort of a piece of paper? A. Yes, sir.

Q. And when Sam came out into the shop the same day you finally signed the contract, did it look as though that sheet of paper he had in his hand was the sheet that Cotton had fixed up?

A. Yes, it was the same sheet of paper. [110]

Q. And he went over the items with you and said, "Is this what you want?" A. Yes, sir.

Q. Then he went back into the office and then out comes the contract?

A. The contract came out.

Q. As it was in its final form?

A. As it is right there.

Q. And your recollection is that Sam's signature was on it when it came out?

A. Sam's signature was on it when I signed it.

Q. Who brought it out, do you know?

A. I couldn't say. Somebody brought it back there. I was busy working and I remember one of the boys said, "Here's this contract," and brought it back. Who brought it, I don't know. But I was busy at the time, and it was just about quitting time, and if I remember right, I was going over to shut the motors off at the time the contract was brought back there.

Q. Now, so far as the signing of the card is

(Testimony of Earnest Curt.)

concerned, I don't know whether Mr. Law showed you that or not, that little square card?

A. Yes, I've seen it.

Q. That shows the date of October 2nd. I presume that's the date you signed it. I think that was on Monday.

A. On Monday. [111]

Q. Did you sign that at the mill?

A. At the mill, yes, sir.

\* \* \*

Mr. Law: I am going to recall Mr. Gamble for a few questions.

CECIL F. GAMBLE

was recalled, and having been previously sworn, was examined and testified further as follows: [112]

Direct Examination

By Mr. Law:

Q. Mr. Gamble, have you been present through the hearing and heard all of the witnesses who testified so far?

A. I have.

Q. As I understand it, you testified that you were present when each of the authorizations and applications for membership cards received here in evidence were signed by the employees?

A. That's right.

Q. Did you and Mr. Hanifin discuss the cards with the employees before they were signed?

A. We always read the title.

Q. Did you discuss them?

A. Yes.

(Testimony of Cecil F. Gamble.)

Q. Did you say anything to the employees about what the cards were?

A. Applications for membership and authorization cards.

Q. Did you tell them that?

A. That's right.

Q. And did you tell them that in each instance?

A. Told it to them in the group in the plant and told it to them as individuals whenever we met them.

Mr. Law: No other questions.

### Cross-Examination

By Mr. Fuidge:

Q. You didn't read the application to Curt [113] or to Mathews, did you?

A. I did not read the whole application card; I read the title. "Application for Membership and Authorization Card."

Q. And the thing that you were talking to the men about was that at this time it was the matter of an election, wasn't it?

A. Collective bargaining and an election.

Q. And that's what you had in mind when you talked to these men was to get an authorization and hold an election and see how you came out, that's right, isn't it?

A. Partially true, yes.

Q. Where is it untrue?

A. Because we also had an application for mem-

(Testimony of Cecil F. Gamble.)

bership if the election was successful, why, then, we would not have to go back and sign the application for membership.

Q. Did you tell them how much their dues would be?

A. At that time—I do not remember when Local 189 was established, but the dues of the Local was to be established by the Local.

Q. What's 189? Is that a local here?

A. That's a local of the American Federation of Grain Millers.

Q. In Marysville?

A. In Marysville, yes.

Q. When was it established?

A. May I ask Mr. Hanifin the date?

Q. Sure. [114]

Trial Examiner Miller: Mr. Hanifin?

Mr. Hanifin: I don't know the exact date; it was some time later than these dates we are discussing in October.

A. It was in the latter part of October, I would say, because there was an arrangement made for the delegation of this local to be present at the convention.

Q. (By Mr. Fuidge): Well, did you discuss dues with these men? How much did you tell them it would be to join?

A. We didn't tell them anything because there had not been any dues set, and the dues would be strictly on a democratic basis.

Q. So that the only thing you would be talking to them about would be this election?

(Testimony of Cecil F. Gamble.)

wanted that so we could plan a local in Marysville.

Q. As a matter of fact, a couple of days afterwards, you filed a petition for an election?

A. Right.

Mr. Fuidge: That's all.

Mr. Law: No questions.

Trial Examiner Miller: You may be excused.

(Witness excused.)

Mr. Law: General Counsel rests.

Mr. Fuidge: You're not going to have the other two signatories? [115]

Mr. Law: No.

Mr. Fuidge: I might have called them myself. You take the stand, Sam.

### SAM ZALL

a witness called by and on behalf of the respondent, having been previously sworn, was examined and further testified as follows:

#### Direct Examination

By Mr. Fuidge:

Q. Mr. Zall, some months prior to the signing of this contract marked Government's Exhibit——

Trial Examiner Miller: 6.

Q. (By Mr. Fuidge): ——6, contract dated October 2, 1950, had there been some talk amongst the men about a wage increase?



(Testimony of Sam Zall.)

A. Yes, there had.

Q. And had that been reported to you by some one of them? A. By Cotton.

Q. Was the subject of the conversation a tie-in between your wage scale and that of General Mills?

A. That's right.

Q. Had there been such conversations going on over the period of, say, two months, just about up until this contract was signed October 2nd?

Mr. Law: I object to the question unless there is a proper foundation. Substantially we appear to be getting hearsay here unless the witness' conversation with people who were there [116] is set forth.

Mr. Fuidge: This is not an impeaching question and that's all you need a foundation for as I understand it. However, let me put it to you this way:

Q. (By Mr. Fuidge): From time to time in the two-month period prior to the signing of the contract, Government's Exhibit 6, had Cotton from time to time reported to you negotiations between him and the men? A. Yes.

Q. And what was your first knowledge that Mr. Gamble or Mr. Hanifin, on behalf of the complaining union, were in or about your premises?

A. The 26th of September.

Q. That's when they have testified that Mr. Gamble called on you?

A. That's when they called on me in my office.

Q. What transpired at that time?

A. Well, they came into the office and introduced

(Testimony of Sam Zall.)

themselves and brought up the subject of a possible contract between me and themselves as representing the men, and words to that effect, and I told them that it was a one-man business and that being a one-man small business that we had gotten along fine without any union representation, that we were getting along fine, and that I personally was not interested in having a union contract negotiated for. [117]

Q. The conversation was on a friendly tenor?

A. It was on a friendly tenor, yes.

Q. And at that time did one or the other of the gentlemen give you a contract, their form contract for your consideration?

A. Yes, it was a master contract, what they called a master contract, and they give it to me to look over.

Q. Who appeared to be taking the lead in the conversation? Mr. Gamble, or Mr. Hanifin?

A. Mr. Gamble.

Q. Did you say anything to them to the effect that so far as you were concerned there would be no union in your plant?

A. Well, I told them that as far as I was concerned, personally, that I didn't particularly need a union to negotiate with.

Q. Now, after that, they were back again, weren't they? A. Yes.

Q. And that was along about the third of October? A. The second or third.

(Testimony of Sam Zall.)

Q. And that conversation took place some place around the office of the plant, out on the sidewalk?

A. Yes.

Q. And you heard Mr. Gamble's testimony? Was that substantially correct?

A. Yes. [118]

Q. You tell us what was said in that conversation.

A. I don't recall word for word what was said. Mr. Gamble or Mr. Hanifin stated that they would like to negotiate, and I told them that I wasn't interested in negotiating, and then they said, I believe, that in that case we would have to have an election, and I said—which was all new to me; I didn't know what they particularly meant by that, and he explained to me that if they had authorization cards from 30% of the men, that they could file with the NRLB for an election, that if they won 51% of the votes, that they would then be the bargaining agent for the men. They were just getting ready to leave, almost in their car, when he explained that to me, and I said, "Well, go ahead and file for your election."

Q. Did you ask him——

A. I asked him when he told me—he then told me—I then asked him, "Well, do you have 30% of the votes, authorization votes in this establishment?" and he said, "Yes." And I said, "Well, may I see the cards, or will you tell me the names of those who authorized you to say that?" And he said, no, he wouldn't. I don't know the exact words he used, but he said no, he wouldn't. That

(Testimony of Sam Zall.)

was it. He wouldn't tell me or show me who they were.

Q. Well, on that day, when earlier in the conversation you said to him you didn't need a union or words to that effect, at that time you didn't even ask his verification that he had 30% [119] authorizations, did you?

A. I didn't have the slightest inkling that he was prepared to negotiate.

Q. Well, were you aware, or had you been informed by any of your men that either Mr. Gamble or Hanifin had been in there talking about them?

A. Yes, Cotton had told me once or twice that the union men were active at the plant and I told Cotton that if he saw them again not to give them permission to talk to the men on my time, and I guess he never saw them again to tell them that.

Q. In any event, on October 3rd, or whatever day it may have been, when you made the statement that you didn't need a union, you had no knowledge that they had signed anybody up?

A. Not the slightest.

Q. Now, when was it that Cotton came to you with this rough list that we've heard about, having to do with the proposed pay schedule of the men?

A. It was a couple of days later after the time that Mr. Gamble and Mr. Hanifin——

Q. Had you sent Cotton out to interview the men?

(Testimony of Sam Zall.)

A. No, I didn't send him out; he came to me.

Q. He came to you?           A. Yes.

Q. At that time did he have that list in his hand?

A. Yes, he had a rough draft and he said he had been talking [120] to the men that, inasmuch as we had been talking about increased wages and other conditions of employment, that he had written it all down and that he had been talking to the men and that that was it, and he showed it to me.

Q. Well, was that the same day—Let me put it to you this way: With that list in your hand did you then go out and talk to the men?

A. Well, obviously I did. I have thought in my own mind that the way that occurred was that they were having a meeting back there and that I had walked through the mill and they were having this meeting and someone called me over and said, "Here's this draft we are going over, and do you want to be in on the meeting?" or started asking me questions about it and I went over and I read each part off.

Q. Well, with the testimony of Matthews and Curt and the other lad, Adams, that you heard here today, is your memory refreshed to the contrary?

A. Well, I think, as near as I can remember, I'd say it was roughly that way.

Q. Well, was it the same day that Cotton brought you the rough sheet, did you go out there and go over it with the men and then bring it in and let Mrs. Miles type it and send it out, is that right?

(Testimony of Sam Zall.)

A. That's right. We went over this rough draft.

Q. You and Cotton? [121]

A. Yes, I believe he was there, as I remember it. All these men were there and I was going over each part there, asking questions, so I said, "Let's go over the whole thing." So we went over the whole thing and then when we got through, I think that I turned it over to Cotton and walked up toward the front and turned it over to him and he took it into Mrs. Miles and she typed it up and I signed it, and I had to leave, I had to go out in the country, and I signed it, say, after lunch. This was all in the morning. And then that evening, or sometime during the day, Cotton had returned it to the men and they signed it.

Q. Now, after you had had your conversation with Mr. Gamble and Mr. Hanifin on the street that day, the last time you saw them, I guess, it was?

A. Yes.

Q. Did you then go through the mill and ask the boys if they had signed the cards?

A. Yes, I did.

Q. How far did you inquire as to what they signed?

A. Well, not very deeply. I just merely asked them if they had—if it was true, that I had just talked to Mr. Gamble and he said he had over 30% of the votes, or authorization cards, rather, and I merely asked each man if he had signed an authorization card.

(Testimony of Sam Zall.)

Q. You got your answer and that was it? [122]

A. That was it.

Q. Well, now, since that time and up 'til today, have you talked to any of them concerning this matter at all? A. No, I haven't.

Q. You have stayed strictly away from it on my advice, haven't you?

A. Yes. I think you could say that about yourself, too, Mr. Gamble, couldn't you?

Mr. Gamble: I stayed away, period.

Q. (By Mr. Fuidge): Mr. Zall, I am not sure whether the record shows in our stipulations this morning, but insofar as the \$90,000 worth of goods that you admit to buying out—that comes to you from out of state, you purchase that from brokers in the state and are billed by the brokers and make the payments to the brokers, is that correct?

A. Yes.

Q. How long have you been in the feed business, Mr. Zall?

A. Well, I have been in the seed business roughly twenty years.

Q. And in Marysville some fifteen?

A. About eleven years.

Q. And you've got an educational background of a degree at Davis, have you not? A. Yes.

Q. What is that degree?

A. It's an M.S. [123]

Q. And amongst other things, did you have extensive courses in poultry husbandry?

(Testimony of Sam Zall.)

A. Yes, I did.

Q. Roughly, how much of your time was devoted to that? To those subjects in the obtaining of your M.S.?

A. Well, I'd say, roughly, 50 per cent of the time.

Q. When did you leave the University?

A. I graduated in 1934.

Q. And subsequent to that time, you have been in the business, feed business, since that time, approximately?

A. Since that time, and to a lesser degree before that time.

Q. And have you in your feed business have opportunity and contacts with poultry producers throughout this area, including the Vantress Mill that you deal with now?

A. Yes.

Q. With your educational background and with your practical background, will you tell me this: what effect, if any, does the feeding of this feed by Vantress Bros. to their stock have to do with the production of eggs?

A. State that again.

Q. Your feed is fed to Vantress breeding stock, is it not?

A. Yes.

Q. What effect does the feeding of your feed to the stock have on the egg production of the hens?

A. Well, it merely increases the layability or production [124] of the hen.

Q. If you were to turn that breeding stock loose on the range out here in the foothills, letting



(Testimony of Sam Zall.)

them scratch for natural feed and grain and bugs and insects and one thing and another, would they still lay eggs?      A. Yes, they would.

Q. And would they still be Vantress chicken eggs?      A. If they owned the chickens, yes.

Q. So, the only effect, then, you say, on the proclivity of the bred hen is on her layability?

A. That's right. [125]

\* \* \*

Mr. Law: Yes. Well, I believe that full weight should be given to the Authorization Cards in the absence of a showing that they were obtained through clear fraud or duress, and that the Board and the Examiner as is the general practice in this case, should not go behind the signed written instruments. It must assume, that in the absence of a clear showing of fraud or duress, that these statements mean what it says, and that the employee knew what he was doing. Otherwise, I think probably the practice of finding the majority representation upon authorization or membership cards should be suspended entirely. It is perhaps meaningless if not improper to ask employees several months after they have signed a card and after there have been unfair labor practices in the case what their original intention was or objective was. By all objective tests, I think they knew what they were signing, and intending the obvious and usual result of their signing, and, therefore, these cards should be considered as adequate proof of majority

representation, as of October 2, and at all times thereafter.

Trial Examiner Miller: Mr. Fuidge?

Mr. Fuidge: I would say this. We not only have fraud, duress, and undue influence, but of course we don't mean to suggest anything like that. But we also have the element of mistake. In the construction of any written instrument, and [137] the contractual intent with which the agreement was signed. And that is what those cards are in substance and effect contracts.

Now, the weight with which those cards are to be received I respectfully submit, is subject to a good deal of consideration. Particularly in these cases, because as one of the boys has testified he thought that all he was doing was signing a form as to whether or not we would have an election, and if we had an election, who would get elected. And then, he finds out that he had put an application in for membership in the Union. There might be a very serious question as to the authority of the Complainant to bring the charge at all. And so, unless there is some thought to the contrary, and there very possibly may be, I do not think that there is any sanctity to be attached to the mere fact that these cards are printed and signed by the parties. But that the contractual intent is also a question of fact, and therefore, the intent having been determined, the weight to be attached to the cards should be fixed by the Examiner.

\* \* \*

Received February 7, 1951. [138]

In the United States Court of Appeals  
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SAM ZALL, an Individual d/b/a SAM ZALL  
MILLING CO.,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR  
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, “In the Matter of Sam Zall, an individual, doing business as Sam Zall Milling Co., and American Federation of Grain Millers International Union, A.F.L.,” the same being known as Case No. 20-CA-503, before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Maurice M. Miller Trial Examiner for the National Labor Relations Board, dated January 29, 1951.

(2) Stenographic transcript of testimony taken before Trial Examiner Miller on January 30, 1951, together with all exhibits introduced in evidence.

(3) Copy of Trial Examiner Miller's Intermediate Report and Recommended Order, dated March 6, 1951, (annexed to item 5 hereof); order transferring case to the Board, dated March 6, 1951, together with affidavit of service and United States Post Office return receipts thereof.

(4) Respondent's exceptions to the Intermediate Report, received March 26, 1951.

(5) Copy of Decision and Order issued by the National Labor Relations Board on June 29, 1951, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 22nd day of October, 1951.

/s/ FRANK M. KLEILER.

[Seal]

NATIONAL LABOR  
RELATIONS BOARD.

[Endorsed]: No. 13031. United States Court of Appeals for the Ninth Circuit. Sam Zall, an Individual Doing Business as Sam Zall Milling Company, Petitioner, vs. National Labor Relations Board, Respondent and National Labor Relations Board, Petitioner, vs. Sam Zall, an Individual Doing Business as Sam Zall Milling Co., Respondent. Transcript of Record. Upon Petition to Review and Petition for Enforcement of Order of the National Labor Relations Board.

Filed October 29, 1951.

PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

[Title of Court of Appeals and Cause.]

PETITION OF SAM ZALL, AN INDIVIDUAL  
DOING BUSINESS AS SAM ZALL MILL-  
ING COMPANY, THAT THE DECISION  
AND ORDER IN CASE NO. 20-CA-503 OF  
THE NATIONAL LABOR RELATIONS  
BOARD BE SET ASIDE AND ENFORCE-  
MENT THEREOF STAYED PENDING  
THE DETERMINATION OF THE  
HEREIN PETITION

To the Honorable, the Court of Appeals of the  
United States of America, for the Ninth  
Judicial Circuit:

The petition of Sam Zall respectfully shows:

That he is an individual doing business as the  
Sam Zall Milling Company, in the City of Marys-  
ville, State of California; that he is engaged in  
the manufacture, amongst other products, of  
chicken feed.

That the National Labor Relations Board of the  
United States of America in proceeding No. 20-CA-  
503 has made its decision and order, dated June 29,  
1951, affirming the Intermediate Report and Recom-  
mended Order of the Trial Examiner.

That the effect of said Decision and Order is to  
hold (1) that the operations of Petitioner are  
within the provisions of the National Labor Rela-  
tions Act; (2) that the American Federation of  
Grain Millers International Union A. F. L. is the  
bargaining agent for the employees of Petitioner

and (3) that Petitioner has engaged in unfair practices in refusing to bargain with said union and has entered into a private employment agreement with his employees.

This Honorable Court is petitioned to set aside said decision and order on the following grounds:

1. That the record shows Petitioner is not engaged in interstate commerce nor in business activities which would have a pronounced effect on commerce.

2. That Petitioner was never faced with a clear cut demand for recognition or definite information that the union was authorized by a majority of the employees to bargain on their behalf.

Petitioner respectfully prays that enforcement of said decision and order be stayed pending the determination of the herein petition.

Respectfully submitted,

RICH, CARLIN & FUIDGE,

By /s/ RICHARD H. FUIDGE,

Attorneys for Petitioner.

#### Points and Authorities

##### I.

Petitioner Is Not Engaged in Interstate Commerce, nor in Business Activities Which Would Have a Pronounced Effect on Commerce

Petitioner manufactures, among other things, chicken feed. None of this chicken feed is shipped

outside the State of California. Petitioner's single largest buyer of this chicken feed is the Van Tress Hatchery and Breeding Farms of Marysville, which itself is not subject to the jurisdiction of the National Labor Relations Act.

“The record establishes by stipulation, that I. K. Vantress, a member of the Vantress enterprise, would testify, if called, that feed purchased from the respondent is fed only to its breeding stock, not to baby chicks; that the breeding stock is not shipped out of the state; and that its out of state shipments consist principally of hatching eggs. Shipments of chickens are rare and represent a ‘very minor percentage’ of total shipments” (Intermediate Report and Recommended Order, page 3, 9-21).

Mr. Zall testified that he had been in the feed business for about twenty years; that he obtained an MS degree at the University of California at Davis where he engaged in extensive courses in poultry husbandry. He testified that the effect of the feeding of the chicken feed to the stock of the Vantress Hatchery merely increases the layability or production of the hen, which if turned loose on the range scratching for natural feed and insects would still lay eggs.

We therefore have a situation where under principles of gentics the actual process of the laying of the egg is not affected—the layability of the hen



is merely increased. The chicken feed never directly or indirectly reaches the eggs which are the products shipped in interstate commerce and serves only to increase the inherent laying power of the hen.

We submit on this basis the instant case is not governed by *McComb vs. Super A. Fertilizer Works, Inc.*, 165 Fed. (2d) 824, *Roland Electrical Company v. Walling*, 326 U. S. 657 or *Hollow Tree Lumber Company*, 91 NLRB 113.

We believe it is a case of first impression.

It is respectfully submitted under the peculiar circumstances of the case, that the operations of the Petitioner, he not being actually or physically engaged in interstate commerce, are not such as would have a pronounced, or any, effect on commerce.

## II.

Petitioner Was Never Faced With a Clear and Unequivocal Demand for Recognition and Bargaining

Petitioner is a small operator. At most he does not employ over eight or nine employees. He had no legal advice during the inception of the matter until it progressed to the point where a complaint issued.

There never was any suggestion by the organizers that he was engaged in interstate commerce within the meaning of the Labor Management Relations Act. The question never arose. The very nature of his operations and the fact that they were

limited to sales inside the State of California would indicate the contrary to him as a layman.

If in fact by reason of these operations and the "dollar formula" adopted by the Board, he was under such jurisdiction (which hypothesis we earnestly deny) he certainly did not know it, either in fact or in law and such violations of Section 8 (a) (1) of the Act as the Board has found occurred, were certainly innocently done.

The serious question here involved is whether petitioner was ever faced with a specific request to recognize and bargain with the Union. A clear and unequivocal demand for recognition is of course the true basis for a claim of violation. (The Solomon Company, 84 NLRB 226; NLRB v. Valley Broadcasting Company, 28 LRRM 2148).

We submit there was no such demand here.

The Intermediate Report states as follows:

"On or about September 26, 1950, having secured an authorization card from Stovall (an employee), Gamble and Hanifin called upon the Respondent at the plant. (Inserts ours.) Zall was advised that the Union planned to organize his employees. The testimony with respect to the conversation that ensued is not in conflict on material matters. Gamble's detailed version of it, which I credit, reads as follows:

" "He said that his plant was like a big family and that whenever he had any trouble in the plant why he went out and adjusted them and he said that he was a man of few words and he laid his cards on the table and says, "I don't want a union here and my people do

not need a union.” And I stated to him that I could appreciate his position, now not knowing too much about the principles and policies of the organization, but after we had got better acquainted, why he would be more satisfied. And he says, “I have stated my position, we do not need a Union in this plant.” ’ ’ (P. 7, 15-34.)

Mr. Zall testified:

“My first knowledge that Mr. Gamble or Mr. Hanifin were in my premises was on September 26, 1950. They came into the office and introduced themselves and brought up the subject of a possible contract between me and themselves as representing the men, and words to that effect, and I told them it was a one man business and that being a one man small business that we had gotten along fine without any union representation, that we were getting along fine and that I personally was not interested in having a union contract negotiated for (R. T. p. 117).

“They gave me what they called a master contract to look over. I told them that as far as I was concerned personally, that I didn’t particularly need a union to negotiate with (R. T. p. 118).

“On the second or third of October, they were back again. I had a conversation out on the sidewalk with them. Mr. Gamble and Mr. Hanifin stated that they would like to negotiate, and I told them I wasn’t interested in negotiating, and then they said, I believe, that in that case we would have to have an election, and I said—which was all new to me,

I didn't know what they particularly meant by that, and he explained to me that if they had authorization cards from thirty per cent of the men, that they could file with the NLRB for an election, that if they won 50% of the votes that they would then be the bargaining agent for the men. They were just getting ready to leave, almost in their car when he explained that to me, and I said, 'Well go ahead and file for your election.'

"I asked him when he told me—he then told me—I then asked him 'Well, do you have 30% of the votes, authorization votes in this establishment?' And he said, 'Yes.' And I said, 'Well, may I see the cards, or will you tell me the names of those who authorized you to say that?' And he said, 'No,' he wouldn't. I don't know the exact words he used but he said no, he wouldn't. That was it. He wouldn't tell me or show me who they were.

"Q. Well, on that day, when earlier in the conversation you didn't need a union or words to that effect, at that time you didn't even ask his verification that he had 30% authorization?

"A. I didn't have the slightest inkling that he was prepared to negotiate." (R. T. p. 119-120.)

In the Intermediate Report it is stated:

"On October 3, 1950, after having secured designation cards from a majority of the Respondent's employees, Gamble and Hanifin returned to the plant; they met the Respondent outside the plant office and held a conversation with him on the sidewalk before the front entrance. Gamble's testi-

mony, which I credit, with respect to this conversation reads as follows:

“‘I asked Mr. Zall if he had read and studied the contract, he said, “Yes,” he had; I asked him what he thought of it and he said he thought it was a very good contract but that was one man’s opinion. I asked him if he would consent to a joint election which was customary between unions and employers for the purpose of recognition of the union as his employees’ representative. He stated that he had already previously stated his position that he did not want a Union in the plant. I asked him if he would consent to an election if we had over thirty per cent . . . thirty per cent of the membership signed up. Signed up means the authorization cards. He says, “Have you got them?” I said, “Yes.” He said, “Let me see them.” I said, “Oh, no.” I said, “That is for the Board and if the Board decides to let you see the authorization cards, that will be another matter.” He stated again that he had previously made himself known on this matter and at that time we should leave and he went into the plant and we left the premises.’

“Gamble also testified, credibly, that Zall, in the course of the conversation, had invited him to go ahead and petition for an election, but stated that his good relations with the Union would cease when it had its election. The Union, in fact, did file a petition for an

election on October 4, 1950; the petition was withdrawn, however, on the 16th of the month."  
(Intermediate Report page 7, 43 to page 8, 14.)  
(Underscore ours.)

On September 26, 1950, when Gamble and Hanifin walked into the Petitioner's plant they were utter strangers to him. He had never seen them before. There was no claim made at that time that the Union represented the employees. As a matter of fact, as the Trial Examiner puts in, "Zall was advised that the Union planned to organize his employees." He might have been "effectively put upon notice with respect to the Union's desire to negotiate as the representative of his employees" but not even the Union contends that on that day it had any authority except from one employee. The only fair intendment from the conversation quoted is that the Union was intending to organize the plant if it could and if it could it would probably propose a contract somewhat similar to the "Master Agreement."

On October 3, 1950, the two organizers returned and other than a passing reference to the contract the substance of the conversation went to the question of an election and the alleged fact that they had the required 30% for that purpose. They asked the Petitioner if he would consent to the election (though why that would be necessary, if they had the necessary consents, is hard to see) and when he asked them to see the consents he was refused and brushed off with the statement, "That is for

the Board and if the Board decides to let you see the Authorization Cards that will be another matter." There was not a single indication any place in the conversation that the Union had the required majority or that based on any claim of such majority they were demanding, requesting or requiring that the petitioner should bargain with them.

There is nothing in the record as we view it, which can justify any conclusion that the Petitioner intended to refuse to negotiate if negotiations were ever presented to him. He was certainly entitled to state his personal opinion that he didn't want a Union in his plant and that his people did not need a Union. That is all he ever said. He did not say, directly or indirectly, by implication or otherwise, that he would never negotiate with an organization representing the requisite percentage of his employees.

The Union did in fact file a petition for an election on October 4, 1950, but for some reason best known to itself this was withdrawn on October 16.

While the Trial Examiner found that there was a sufficient demand in which he is sustained by the Board, nonetheless he did have a doubt in his mind as to compliance with the requirement. In his Intermediate Report he says:

"Ordinarily, it is true, an employer is not required to recognize and bargain with a Union until he receives a request for such recognition or the initiation of negotiations from the labor organization. (*NLRB v. Columbian Enameling and Stamping Company*, 306 U. S. 292.) And the record, in its

present form, does give rise to some doubt with respect to the Union's compliance with this requirement. It did not, in conformity with its usual practice, dispatch a letter to the employer advising him of its status as a majority representative and requesting a conference for the purpose of initiating negotiations." (Intermediate Report pages 9, 16-24.)

We realize that the motives under which an employee signs an authorization card may be of no interest in determining the question of representation. However, in this particular case the testimony of the employees is such that it certainly supports the conclusion that when the organizers called on the petitioner they had nothing in mind but an election.

There were seven employees within the unit. Five signed so-called "Authorization and Application for Membership Cards." The testimony of the organizer was that two additional employees also signed the cards but he did not see fit to bring the cards in before the Trial Examiner. The two employees were not called as witnesses.

The General Counsel called only three of the five. Two of the three testified that they understood that their signatures were for the limited purpose of permitting the Union to file a petition and bring about an election.

The matter is best summed up in the words of the Honorable A. Murdock, who in dissenting in part said:

"It is axiomatic that a refusal, particularly an employer's refusal to recognize and bargain with a



Union, must be preceded by a specific request. The Board has heretofore characterized such a request as 'a clear and unequivocal demand for recognition.' " (Citing the *Solomon Company*, 84 NLRB 26 and *NLRB v. Valley Broadcasting Company* 28 LRRM 2148.)

"An examination of the facts in the instant case reveals, as the majority concedes, no evidence that the Union at any time specifically requested the respondent to recognize it as the majority bargaining representative of his employees. Moreover there is no evidence that the Union representatives, who met twice with the respondent, informed him that they were authorized by a majority of his employees to bargain on their behalf. Rather, it is apparent from the very testimony of the Union agent, Gamble, that on October 3, 1950, the Union claimed only 'over 30% of the membership signed up.' The majority, however, are satisfied with Gamble's conversation with respondent on October 3, 1950, together with the language of the general recognition clause contained in the 'Master Agreement' which the Union had left with the representative to 'study,' constitute a sufficient request and claim to majority representative status. But the evidence, according to the credited testimony of the Union's representative, reveals merely that the Respondent was put on notice that the Union was organizing his plant and was requesting him to agree to a consent election. It was in this context that Gamble, the Union agent, left the blank contracts with Respondent, expressing sympathy for the Respond-

ent's anti-union position and requesting that the Respondent did not know 'too much about the principles and policies of the organization.' "

In footnote 12 Mr. Murdock says:

"Although I agree with the Trial Examiner's findings that the Union made no claim to majority status, I cannot agree with its further finding that to do so would have been 'futile.' The record will not support a conclusion that the Respondent had demonstrated an inflexible determination to have no dealings with the Union. Indeed, he accepted the contract, read it, and subsequently told Gamble he thought it was 'a good contract.' Under these circumstances, it was incumbent upon the Union to speak up and state its claim to a majority and make a request to negotiate a contract so providing, if it was actually requesting anything more than a consent election agreement."

Mr. Murdock proceeds further in his Opinion:

"The majority stress the Respondent's testimony that he interpreted the remarks of Gamble as an attempt to negotiate. But words in the mouths of inexperienced witnesses are not words of art. It is clear that Gamble wanted to negotiate a consent election agreement. It is not clear, and I do not think the Board should so hold, that the Union was also requesting immediate recognition as the bargaining representative of the Respondent's employees."

Then in footnote 13 Mr. Murdock says:

"I cannot agree with the majority that the Respondent's use of the word 'negotiate' in his testimony means 'collective bargaining.' Gamble's tes-

timony, which the Respondent agreed was accurate, and which the Trial Examiner credits, reveals that Gamble said: 'I asked him (Zall) if he would consent to an election if we had over thirty per cent.' The Respondent asked to see the authorization cards and Gamble refused. It was then, according to Gamble's credited testimony, that the Respondent said: 'Go ahead and have your election.' I interpret the testimony of the Respondent, cited in footnote 7 of the majority's opinion, to be in accord with Gamble's version of the conversation between them."

Mr. Murdock completes his Opinion and says:

"While I fully agree with the majority that the Respondent's conduct following his conversation with Gamble on October 3, 1950, was in violation of the rights of his employees under the Act, I do not believe that such conduct may properly be substituted for the requirement that a union must clearly and affirmatively make known to an employer that it is the majority bargaining representative of his employees and desires immediate recognition for the purposes of collective bargaining. In my opinion, this requirement is a condition precedent to a finding that an employer had refused to bargain with a labor organization.

"Accordingly, I would dismiss the allegation in the complaint that the Respondent has refused to bargain within the meaning of Section 8 (a) (5) of the Act."

We respectfully submit that the decision and order complained of should be set aside on the grounds:

1. That Petitioner is not within the jurisdiction of the Act and
2. That if within the jurisdiction of the Act he has not been faced with the clear and unequivocal demand required.

Respectfully submitted,

RICH, CARLIN & FUIDGE,

By /s/ RICHARD H. FUIDGE,

Attorneys for Petitioner.

State of California,  
County of Yuba—ss.

Richard H. Fuidge, being first duly sworn, deposes and says: That he is one of the attorneys of record for the petitioner Sam Zall, in the above-entitled action; that he has read the within and foregoing petition and Points and Authorities in support thereof and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are stated therein on his information or belief, and as to those matters he believes it to be true; that he maintains his law office in the City of Marysville, County of Yuba, State of California, and that said petitioner, Sam Zall, at the date hereof, is without said County and, therefore, affiant makes this verification on behalf of said petitioner.

/s/ RICHARD H. FUIDGE.

Subscribed and sworn to before me this 25th day of July, 1951.

[Seal]     /s/ EDITH FRANCISOVICH,  
Notary Public in and for the County of Yuba, State  
of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 27, 1951.

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(Title of Court of Appeals and Cause.)

PETITION FOR ENFORCEMENT OF AN  
ORDER OF THE NATIONAL LABOR RE-  
LATIONS BOARD

To the Honorable, the Judges of the United States  
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Sam Zall, an individual d/b/a, Sam Zall Milling Co., Marysville, California, his agents, successors and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Sam Zall, an individual doing business as Sam Zall Milling Co. and American Federation of Grain Millers International Union, AFL," the same being known as Case No. 20-CA-503.

In support of this petition the Board respectfully shows:

(1) Respondent is an individual engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on June 29, 1951, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, his agents, successors and assigns. The aforesaid order provides as follows:

#### Order

Upon the entire record in the case, and pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Sam Zall, an individual d/b/a Sam Zall Milling Co., Marysville, California, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the American Federation of Grain Millers International Union, affiliated with the American Federation of Labor, as the exclusive representative of all his production and maintenance employees, includ-

ing the truck driver, but exclusive of supervisors as defined in the Act, salesmen, and office employees.

(b) Giving effect to the agreement made with his employees on October 5 or 6, 1950, or any modification, continuation, extension, or renewal thereof, to forestall collective bargaining or deter self-organization; provided, however, that nothing herein shall be construed to require the Respondent to vary any substantive provisions of such agreement, or to prejudice the assertion by the employees of any rights they may have thereunder.

(c) In any other manner interfering with, restraining, or coercing his employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the American Federation of Grain Millers International Union, A. F. L., or any other labor organization, to bargain collectively through representatives of their own free choice, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with American Federation of Grain Millers Interna-

tional Union, A. F. L., as the exclusive representative of his employees in the aforesaid bargaining unit, with respect to their rates of pay, wages, hours of work, and other terms or conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Give a separate written notice to each of the employees who executed the agreement of October 5 or 6, 1950, or any modification, continuation, extension, or renewal thereof: (1) That he will not enforce or attempt to enforce the agreement in question to forestall collective bargaining or deter self-organization; (2) that employees will not be required or expected, by virtue of that agreement, to deal with the Respondent directly in respect to their rates of pay, wages, hours of work, or other terms and conditions of employment; (3) that such discontinuance of the contract is without prejudice to the assertion of any legal rights employees may have required under it, or to the assertion of any defenses thereto acquired by the Employer.

(c) Post at his establishment in Marysville, California, copies of the notice attached hereto and marked "Appendix A."<sup>10</sup> Copies of the notice to be furnished by the Regional Director for the Twentieth Region, as the agent of the Board, should be

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<sup>10</sup>In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order," the words "A Decree of the United States Court of Appeals Enforcing."



posted by the Respondent immediately upon their receipt, after being duly signed by him or a person qualified to act as his representative, and should be maintained by him for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps should be taken by the Respondent to insure that these notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Twentieth Region in writing within ten (10) days from the date of this Order what steps Respondent has taken to comply herewith.

(3) On June 29, 1951, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's Counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record in the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the

transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent, his agents, successors and assigns to comply therewith.

NATIONAL LABOR  
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,  
Assistant General Counsel.

Dated at Washington, D. C. this 22nd day of October, 1951.

Appendix A

Notice To All Employees Pursuant to  
a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, I hereby notify my employees that:

I Will Not in any manner interfere with, restrain, or coerce my employees in the exercise of their right to self-organization, to form labor organizations, to join American Federation of Grain Millers International Union, A. F. L., or any other labor organization, to bargain collectively through representatives of their own free choice, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement which requires member-

ship in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

I Will bargain collectively upon request with the above-named union as the exclusive representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All of my production and maintenance employees, including the truck driver, but exclusive of supervisors as defined in the Act, salesmen, and office employees.

I Will Not give effect to the agreement executed by the employees on or after October 5, 1950, or any modification, continuation, extension, or renewal of it to forestall collective bargaining or deter self-organization.

All of my employees are free to become, remain, or refrain from becoming members of the above-named union, or any other labor organization, except to the extent that their right to refrain may be affected by a lawful agreement which requires membership in a labor organization as a condition of employment.

SAM ZALL MILLING CO.,  
(Employer)

By .....  
(Representative) (Title)

Dated .....

This notice must remain posted for 60 days after its date, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed October 29, 1951.

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[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH  
PETITIONER INTENDS TO RELY

In this proceeding, petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. Respondent is engaged in commerce within the meaning of the Act.

2. The Board properly found that respondent violated Section 8 (a) (1) of the Act by interrogating its employees concerning their union affiliation and by negotiating individual employment contracts with them for the purpose of forestalling collective bargaining.

3. The Board properly found that respondent violated Section 8 (a) (5) of the Act by refusing to bargain with the union and by bargaining directly with the individual employees.

/s/ A. NORMAN SOMERS,  
Assistant General Counsel, National Labor Relations Board.

Washington, D. C., Oct. 22, 1951.

[Endorsed]: Filed October 29, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER SAM ZALL INTENDS TO RELY

In this proceeding petitioner, Sam Zall will rely upon the following points:

1. That he is not engaged in commerce within the meaning of the National Labor Relations Act.
2. The claimed violations of Section 8 (a) (1) and of Section 8 (a) (5) of the Act are not supported by the record.

Respectfully submitted,

RICH, CARLIN & FUIDGE,

By /s/ RICHARD H. FUIDGE,  
Attorneys for Petitioner,  
Sam Zall.

November 6, 1951, Marysville, California.

[Endorsed]: Filed November 7, 1951.

[Title of Court of Appeals and Cause.]

## ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America:

To: Sam Zall Milling Company, 9th & B Streets,  
Marysville, California and American Federation  
of Grain Millers International Union,  
AFL, Attn: Mr. Cecil F. Gamble, 610 Santa  
Clara Street, Vallejo, California

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10 (e)), you and each of you are hereby notified that on the 29th day of October, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on June 29, 1951, in a proceeding known upon the records of the said Board as

“In the Matter of Sam Zall, an individual doing business as Sam Zall Milling Co., and American Federation of Grain Millers International Union, AFL, Case No. 20-CA-503,”

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition was attached hereto.

You are also notified to appear and move upon,

answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 29th day of October in the year of our Lord one thousand, nine hundred and fifty-one.

[Seal]     /s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

Returns on Service of Writ attached.

Received October 30, 1951.

[Endorsed]: Filed November 7, 1951.

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[Title of Court of Appeals and Cause.]

### ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America

To: American Federation of Grain Millers International Union, AFL, 918 Metropolitan Building, Minneapolis, Minnesota

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor

Relations Board Act, Section 10 (e)), you and each of you are hereby notified that on the 29th day of October, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on June 29, 1951, in a proceeding known upon the records of the said Board as

“In the Matter of Sam Zall, an individual doing business as Sam Zall Milling Co., and American Federation of Grain Millers International Union, AFL, Case No. 20-CA-503,”

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 29th day of October in the year of our Lord one thousand, nine hundred and fifty-one.

[Seal]      /s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

Return on Service of Writ attached.

[Endorsed]: Filed November 13, 1951.



No. 13031

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**United States**  
**Court of Appeals**  
for the Ninth Circuit.

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SAM ZALL, an Individual Doing Business as Sam  
Zall Milling Company,  
Petitioner,  
vs.

NATIONAL LABOR RELATIONS BOARD,  
Respondent,  
and

NATIONAL LABOR RELATIONS BOARD,  
Petitioner,  
vs.

SAM ZALL, an Individual Doing Business as Sam  
Zall Milling Co.,  
Respondent.

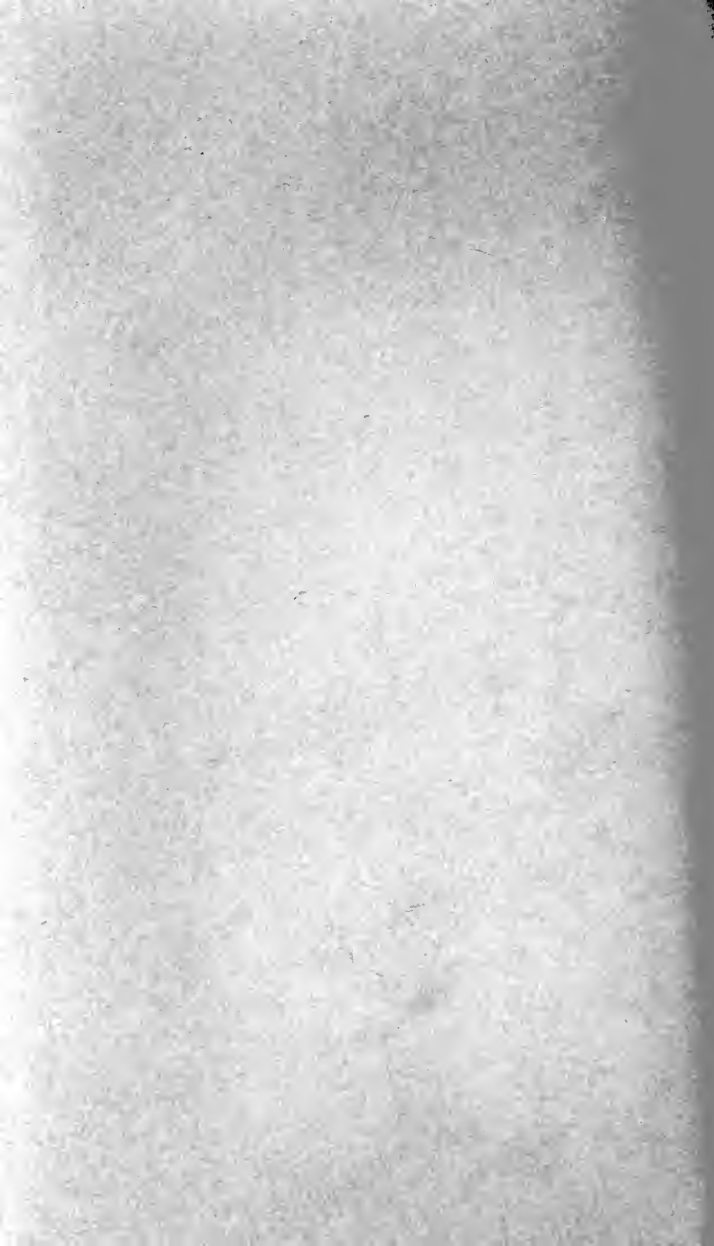
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**SUPPLEMENTAL**  
**Transcript of Record**

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Upon Petition to Review and Petition for Enforcement  
of Order of the National Labor Relations Board

JUL 1 1952



No. 13031

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**United States**  
**Court of Appeals**  
for the Ninth Circuit.

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SAM ZALL, an Individual Doing Business as Sam  
Zall Milling Company,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SAM ZALL, an Individual Doing Business as Sam  
Zall Milling Co.,

Respondent.

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**SUPPLEMENTAL**  
**Transcript of Record**

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**Upon Petition to Review and Petition for Enforcement  
of Order of the National Labor Relations Board**



## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Witness, General Counsel's:

Adams, Charles

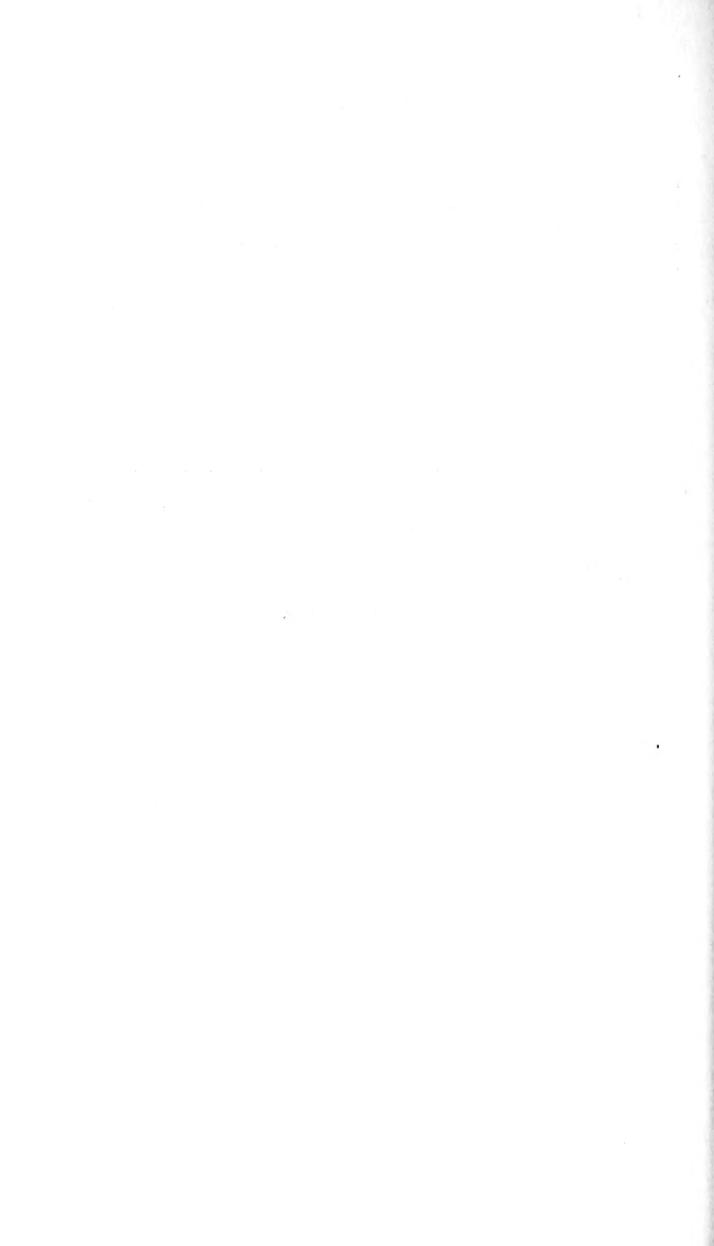
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CHARLES ADAMS

a witness called for and on behalf of the General Counsel, after being first duly sworn, was examined, and testified as follows:

Direct Examination

By Mr. Law:

Q. What is your full name, Mr. Adams? Just with the middle initial.

A. Charles H. Adams.

Q. And what is your address, Mr. Adams?

A. Pepper Street, in Sutter City.

Q. Are you employed by the Sam Zall Milling Company? A. Pardon?

Q. Are you employed by the Sam Zall Milling Company? A. Yes.

Q. For how long have you worked for them?

A. It was a year ago this month.

Q. And what is your job? [83\*]

A. Sack filler.

Q. I will show you a card which has been received in evidence as General Counsel's Exhibit No. 5(a), and I will ask you if that is a card which you signed yourself? A. —

Trial Examiner Miller: Let the record show that the witness nodded in the affirmative.

The Witness: You mean is the card I signed?

Q. (By Mr. Law): Yes. A. Yes.

Q. Is this your signature at the lower left-hand corner? A. Yes.

(Testimony of Charles Adams.)

Q. And did you sign the card on October 2, 1950, the date it bears? A. Yes.

Q. All right.

Now, I will show you another document, a copy of which has been received in evidence as General Counsel's Exhibit No. 6, and I will ask you if you signed the original of that? A. Yes, sir.

Q. Is this your signature, the next to the bottom one on the right-hand side? A. Yes, sir.

Q. Now, did you sign this document, General Counsel's Exhibit No. 6, before or after you signed the authorization and [84] application card?

A. Signed it afterwards.

Q. Which did you sign after?

A. The contract.

Q. That is the contract between Sam Zall and yourself and certain other employees?

A. That's right.

Q. How long after you signed the authorization and application for membership cards did you sign the contract? A. Two or three days.

Trial Examiner Miller: Two or three days from that date?

The Witness: It was part of the same week.

Q. (By Mr. Law): Now, where did you sign it?

A. In the mill.

Trial Examiner Miller: In order to clarify this matter, I am going to give you a 1950 calendar, Mr. Adams.

You testified that you signed the application and authorization card for the Union on October 2. If



(Testimony of Charles Adams.)

October 2, 1950, was on a Monday, can you tell me when, in that week, you signed that contract?

The Witness: Well, I'm not sure. But it was either the fifth or the sixth.

Trial Examiner Miller: Very well.

Q. (By Mr. Law): And you say that the contract was signed in the mill? [85]

A. That's right.

Q. Was anyone present when you signed it?

A. Yes.

Q. Who else was present?

A. Everyone that signed it.

Q. Was Mr. Zall present? A. No, sir.

Q. Was his signature on it at the time you signed it? A. Yes, sir.

Q. Did you see the other employees whose names appear on it, sign it? A. Yes.

Q. Did they sign at the same time you did?

A. Yes.

Q. Now, before you signed, did you and any of the other employees in your presence have any discussion about the contract with Mr. Zall?

A. Well, first, Mr. Zall came out and read it.

Q. Did what?

A. Mr. Zall came out and read the contract over first.

Q. When was this that he came out and read it?

A. Pardon?

Q. When was it that he came out and read the contract?

A. Well, it was approximately between two and three o'clock in the afternoon. [86]

(Testimony of Charles Adams.)

Q. Was that on October fifth or sixth?

A. Fifth or sixth.

Trial Examiner Miller: When you say he read it, I am not quite sure what you mean. You mean he read it to himself, or read it aloud?

The Witness: He read it to the group of us.

Q. (By Mr. Law): Then what happened?

A. Pardon?

Q. Well, I had better ask you first, did he say anything to you about the contract before he read it?

A. Well, he brought it back and said we wrote up an agreement as far as he knew to what we wanted. And he read it over. And he asked us if we were all satisfied with it. And everyone present agreed that they were satisfied. And then he took it back to the office and then his foreman, Mr. Cotton, brought it back out after it was typed. And we signed it.

Q. Now did—have you told the entire conversation between the men and Mr. Zall on that occasion?

A. Pardon?

Q. Have you told the entire conversation between Mr. Zall and the men on the occasion of October fifth or sixth when the contract was signed. Have you told us everything that happened?

A. That date?

Q. Yes.

A. Yes. But the first contract was brought up by [87] Mr. Cotton. He wrote it out in his own handwriting, just about what plans we wanted.

Q. When was that, if you remember, that he wrote that?

(Testimony of Charles Adams.)

A. Well, it was either the day before Mr. Zall made it up, or else that following morning.

Q. Did Mr. Cotton come and speak to you about what you might want in the contract?

A. Yes, sir.

Q. What did he say to you? And what did you say to him?

A. Well, he wanted to know just what kind of an agreement that we wanted. And we told him that if he would agree to pay the same prices as General Mills, and give us our overtime when we got it, and give us all the overtime that was possible to give us, why then, we would make the agreement.

Trial Examiner Miller: When you say "We said this," how did Mr. Cotton elicit this information from you? Did he talk to you individually or in a group?

The Witness: He was with us when we first drew up the contract, and we came to work that morning, where we usually stand up front until it's time to go to work. That's when he let each and every one of us read it over. And that's when we all agreed that that was just about what plans we wanted. So then he said he would take it to Mr. Zall and see if he would OK it.

Trial Examiner Miller: Go ahead, Mr. Law. [88]

Q. (By Mr. Law): Now, at any time after you signed the authorization and application for membership card for the Union, did you and Mr. Zall have any conversation with respect to the signing of that card?

(Testimony of Charles Adams.)

A. He come around and asked us if we signed one.

Q. Did he ask you personally?

A. Personally.

Q. And when was it that he asked you that?

A. The day after I signed it.

Q. Was anyone else present at the time he asked you?

A. No, sir.

Mr. Law: No other questions.

### Cross-Examination

By Mr. Fuidge:

Q. Mr. Adams, you have been employed by Mr. Adams about a year?

A. Yes.

Q. And it is true, is it not, that a couple of months before Mr. Gamble or Mr. Hanifin came up to the plant, I thought there had been some talk about, or, among the men about an increase in the pay scale?

A. Yes, sir.

Q. That's right, is it not?

A. Yes, sir.

Q. And, as a matter of fact, you men were talking it over among yourselves, talking to Mr. Cotton about it; that is it, [89] is it not?

A. Yes, sir.

Q. And that negotiation was going on for—well, about the same time that Mr. Hanifin and Mr. Gamble appeared, was it not?

A. I would say about two months before.

Q. Yes, it started about two months before, but it was subject to on-and-off conversations between the men and Cotton all that time, was it not?

(Testimony of Charles Adams.)

A. Yes, sir.

Q. And that pay scale that you mentioned that you men were talking about was to be geared somewhat to the pay scale over there at General Mills, was it not?

A. That's right.

Q. Now, sometime in early October, these two gentlemen came out to the plant, and they talked to you. Is that right?

A. The first time they came in, they talked to just Stovall.

Q. Yes. And they did not talk to you that day?

A. No, sir. Not the first day.

Q. Then sometime afterwards, they talked to you. Where was it, at the plant?

A. Yes, sir.

Q. And was it then that you signed that card that Mr. Law has shown you?

A. Not the first time. [90]

Q. How many times was it that they talked to you before you signed the card?

A. I signed the card the second time they talked to me.

Q. Was that be, say, the next day after they talked to you, or two or three days, or what?

A. Well, they didn't come in every day.

Q. Give me as best you can—let us put it this way: Do you remember about when they came in to see Mr. Stovall?

A. Well, it was, I'd say the latter part of September.

Q. All right. Then, sometime after that, they came to see you?

A. Yes.

(Testimony of Charles Adams.)

Q. Then the next time they saw you, you signed the card. Is that right? A. That's right.

Q. And the card says the 2nd of October, and I assume that is correct? A. That is correct.

Q. How far back would it be that they first talked to you?

A. I would say a week or two weeks.

Q. All right. Now, when you signed the card, Mr. Adams, were both Mr. Gamble and Mr. Hanifin there at the time? This is Mr. Gamble and this is Mr. Hanifin.

A. Yes. I was talking to Gamble, and Mr. Hanifin was talking to Mathews over by the railroad. [91]

Q. I see. Now what did Mr. Gamble tell you about the effect of signing this card?

A. You mean what the card meant?

Q. Yes.

A. Well, he told me that if we got, I think it was around thirty or forty per cent of the men to sign one of those, then he would go up and file for an election. And we'd get to vote whether we wanted union or didn't.

Q. Now, did you have any understanding when you signed this card other than this?

A. No, I didn't.

Trial Examiner Miller: Your answer was what?

The Witness: No, sir.

Q. (By Mr. Fuidge): When you signed this card, did you intend to make an application to join the American Federation of Grain Millers, AFL.?

A. You mean, did I intend to?

(Testimony of Charles Adams.)

Q. Yes.

A. Well, the group of fellows—he said we would have to vote in the election. Well, at that time, I imagine if it was put up, we would have voted yes.

Q. What I am asking you is this: Did you intend to make application to join the Union when you signed this card?

A. No, sir. I just figured I was going to have to vote on it. [92]

Q. Your understanding was that this was to determine whether or not there should be an election to determine if the Union in question was to represent you. Is that right?      A. Yes.

Q. Was there anything else understood by you as to what would happen if you signed this card, as to your becoming a member of the Union?

A. No.

Q. Insofar as Mr. Zall talking to you about the contract, that is the one you signed. If I understand your testimony correctly, sometime before it was actually signed by you, Cotton had a talk with you men, or you had a talk with him out by the sales desk; is that right?      A. That's right.

Q. And was it him saying to you that he would get you an increase, or was it you saying, you men saying to him, "Get us an increase"?

A. Well, he knew we were pretty well riled up about the thing, so he asked us if there could be any agreement made to bring everything just about up to General Mills, and would we be in favor of it.

(Testimony of Charles Adams.)

And we said "Yes." So he put it up, to the best of his knowledge, just about what we wanted.

Q. Was that when he wrote it down on a piece of paper that you told us about?

A. Well, that was the day before that he was talking [93] about it. Then, that night, he figured it up, and wrote it down just about the way we wanted, and let us read it.

Q. I see. And that was agreeable to you?

A. We told him that that was just about what we wanted.

Q. Now, when Sam came out into the plant where you boys were, what he had was this sheet of paper that Cotton had written up; is that it?

A. No, sir.

Q. He had something else?

A. He had typed it first.

Q. I see. He had it typed and read it to you, and said, "Is that what you want"?

A. Yes, sir.

Q. He didn't sign it at that time, but went back into the office with it; is that right?

A. Well, I don't know whether he had it signed or not.

Q. Well, I am a little bit mixed up in your testimony as to what happened out there the day that you signed the contract.

Do I understand correctly, or incorrectly, you straighten me out, that before you signed the contract, Sam came out and read it to you?

A. That's right.

Q. And then went back to the office, and then



(Testimony of Charles Adams.)

came back with something in his hand, and that is the thing that you signed? [94]

A. Well, Sam didn't bring it back when we signed it.

Q. Didn't?           A. He didn't.

Q. Who did?           A. Cotton.

Q. Now we are straightened out.

The first time Sam came out with a piece of paper, would you say it was this one that you signed?           A. I couldn't say.

Q. And in any event, he read you what is in the substance of this contract?           A. Yes.

Q. Then went back to the office, and then pretty soon out comes Cotton with the contract, and you fellows signed it?           A. That's right.

Q. And to your recollection, at the time you signed it, Sam's signature was on it?

A. That's right.

Q. And it was after you signed the contract that he asked you and several others, whether you had signed the union cards with Mr. Gamble and Mr. Hanifin?           A. It was before.

Q. I see. All right.

Was that the extent of his inquiry, as to, for instance, "Here, Jack, did you sign the card with Gamble, or didn't you?" [95]

A. I signed the card with—

Q. I mean, is that about what Sam asked you?

A. Well, he come out and asked me, he says, "Did you sign that card?" I said "Yes." He said, "Well, you want the Union." I said, "Well, it's

(Testimony of Charles Adams.)

not me; the rest of them signed, too." He said, "Well, you and Mathews are the only ones who said you signed." So I told him, "I was there; I know that the rest of them did, too." So he went up to where Skinner was working and I imagine to ask him.

Q. Did you hear what he said to Skinner?

A. I didn't hear. [96]

\* \* \*

### SAM ZALL

a witness called by and on behalf of the respondent, having been previously sworn, was examined and further testified as follows: [116]

### Direct Examination

By Mr. Fuidge:

\* \* \*

Q. That's all.

### Cross-Examination

By Mr. Law:

Q. This question doesn't necessarily require a precise and exact answer, but for how long would the Vantress Brooding and Hatchery Company remain in business if their—if they turned all their breeding stock out to scratch on the open range for their feed?

A. Well, just as long as they'd want to stay in business.

Q. Would their hens continue to lay eggs, hatch-

(Testimony of Sam Zall.)

ing eggs, suitable for export to various parts of the country?      A. Yes, they would.

Q. Seriously, I do expect you have an answer on this question as a person familiar in the field: To what extent does the feeding of a properly prepared and well-balanced feed, such as [125] you manufacture, increase the laying of eggs suitable for—that is, of hatching eggs suitable for shipment?      A. To what per cent?

Q. To what extent is the feeding of the breeding hens with proper feed increase their production?

A. I don't know whether I could answer that; it would be pretty hard to say. I honestly don't think I could answer that one.

Q. One thing is sure: If they're not fed at all, they would die, wouldn't they?      A. No.

Q. They'll die in time, won't they?

A. They'll die in time, yes, as do we all.

Q. All right; I think we may be off on a tangent, anyway.

A. The point I wanted to say was you could take those same hens and put them out loose on the range, and they'll forage for themselves, that's my point. In other words, they'll keep alive.

Q. (By Mr. Law): It is a better arrangement, however, to feed them?

A. Well, that's questionable. Off the record, you'd save an awful lot of money on feed if you didn't have to feed them. Feeding a chicken is 60 per cent of its life in cost.

Q. I have a few other questions which, if you'd

(Testimony of Sam Zall.)

indulge me, Mr. Fuidge, on it, are not precisely related to the direct [126] examination.

They do relate to the entire case, however.

Q. Were the terms of the contract, which is General Counsel's Exhibit No. 6, actually put into effect by you as of October 2?

A. Well, they were put in effect at the time they were signed.

Q. And did you make the pay increases relate back to October 2?

A. I don't remember that. I have the records at the office. I don't remember whether it was put over to that week, or the next week.

Q. All right. Now have you ever had a collective bargaining agreement covering your employees with any Union?

A. Yes, I did have once.

Q. When was that?

A. I stand corrected on that. I did not have. I was thinking about something else.

Q. You did not file a petition, an Employers' Petition for an election with the Regional Office of the National Labor Relations Board at any time, did you?

A. No, I haven't. [127]

\* \* \*

[Endorsed]: No. 13,031. United States Court of Appeals for the Ninth Circuit. Sam Zall, an Individual Doing Business as Sam Zall Milling Company, Petitioner, vs. National Labor Relations Board, Respondent, and National Labor Relations Board, Petitioner, vs. Sam Zall, an Individual Doing Business as Sam Zall Milling Co., Respondent. Supplemental Transcript of Record. Upon Petition to Review and Petition for Enforcement of Order of the National Labor Relations Board.

Filed Apr. 28, 1952.

PAUL P. O'BRIEN,  
Clerk.



No. 13,031

United States Court of Appeals  
For the Ninth Circuit

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SAM ZALL, an individual doing business as Sam Zall Milling Company,  
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent,*

and

NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

vs.

SAM ZALL, an individual doing business as Sam Zall Milling Co.,  
*Respondent.*

BRIEF IN SUPPORT OF  
PETITION OF PETITIONER SAM ZALL THAT THE DECISION  
AND ORDER IN CASE NO. 20-CA-503 OF THE NATIONAL  
LABOR RELATIONS BOARD BE SET ASIDE.

---

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*Sam Zall.*

MAY - 6 1952





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**OPENING STATEMENT.**

In this matter there are before the Honorable Court under the one number, two proceedings, that of Sam Zall, an individual doing business as Sam Zall Mill-

ing Co. as petitioner, against the National Labor Relations Board as respondent, in which the petitioner therein prays that the Decision and Order in case No. 20-CA-503 of the National Labor Relations Board be set aside and that enforcement thereof be stayed pending the determination of said petition, and that of the National Labor Relations Board wherein the Board is petitioner and Sam Zall is respondent for the enforcement of an order of the Board heretofore made.

In order to avoid confusion between the two petitioners we will characterize the petitioner Sam Zall as the "Employer".

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#### **JURISDICTIONAL STATEMENT AND OF PROCEEDINGS HAD.**

Upon a charge and amended charge filed by the American Federation of Grain Millers and International Union, the General Counsel of the National Labor Relations Board in the name of the Board caused the Regional Director of the Twentieth Region at San Francisco to issue a complaint (Tr. p. 3) against the Employer alleging that he had engaged and was continuing to engage in unfair labor practices affecting commerce within the meaning of section 8 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Statutes 449 (29 U.S.C.A. 141 et seq.).

After a hearing had, the Intermediate Report and Recommended Order of the Field Examiner was made, adverse to the Employer (Tr. p. 10, et seq.).

Exceptions thereto were duly filed (Tr. p. 54) and eventually the National Labor Relations Board by its Decision and Order (Tr. p. 39), (The Honorable Abe Murdock dissenting) affirmed the Recommended Order.

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### **THE ISSUES RAISED.**

The issues raised on this appeal are the following:

(1) Whether the Employer is engaged in interstate commerce or in business activities which would have a pronounced effect on commerce.

(2) Whether the Employer has refused to bargain with the Union in the absence of a clear-cut demand for recognition and definite information that the Union was authorized by a majority of the employees to bargain on their behalf.

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### **SPECIFICATIONS OF ERROR.**

It is respectfully submitted the National Labor Relations Board erred:

(1) In finding the Employer to be engaged in interstate commerce or in such business activities which would have a pronounced effect on commerce.

(2) In requiring the Employer to cease and desist from refusing to bargain collectively with the Union as the exclusive representative of his production and maintenance employees and from giving effect to an employment contract between the employees and the Employer.

**STATEMENT OF THE FACTS IN SUPPORT OF  
FIRST ASSIGNMENT OF ERROR.**

The first assignment of error is that the Employer is not engaged in interstate commerce nor in business activities which would have a pronounced effect on commerce.

The Employer, amongst other things, manufactures chicken feed. None of this chicken feed is shipped outside the State of California. Employer's single largest buyer of this chicken feed is the Vantress Hatchery and Breeding Farms of Marysville, which itself is not subject to the jurisdiction of the National Labor Relations Act (Tr. p. 67). Purchases by the Employer of the ingredients of this chicken feed are made entirely within the State of California (Tr. p. 161).

It was stipulated that feed purchased from the Employer by the Vantress Hatchery is fed only to its breeding stock, not to baby chicks; that the breeding stock is not shipped out of the state; and that the out of state shipments consist principally of hatching eggs; shipments of chickens are rare and represent a minor percentage of total shipments of the Vantress enterprise (Tr. p. 14).

The Employer testified that he had been in the feed business for roughly twenty years; that he has the degree of M.S. received at the University of California at Davis, where he had extensive courses in poultry husbandry. He graduated in 1934. He further testified as follows:

“Q. Have you in your feed business had opportunity and contacts with poultry producers throughout this area that you deal with now?

A. Yes.

Q. With your educational background and with your practical background will you tell me this: What effect, if any, does the feeding of this feed by Vantress Brothers to their stock have to do with the production of eggs?

A. State that again.

Q. Your feed is fed to Vantress breeding stock, is it not?

A. Yes.

Q. What effect does the feeding of your feed to the stock have on the egg production of the hens?

A. Well it merely increases the layability or production of the hen.

Q. If you were to turn that breeding stock loose on the range out here in the foothills, letting them scratch for natural feed and grain and bugs and insects and one thing and another, would they still lay eggs?

A. Yes, they would.

Q. And would they still be Vantress chicken eggs?

A. If they owned the chickens, yes.

Q. So the only effect then you say on the proclivity of the hen is on her layability?

A. That's right.” (Tr. p. 151 to p. 163.)

**ARGUMENT IN SUPPORT OF FIRST  
SPECIFICATION OF ERROR.**

Under this specification we have a situation where under principles of genetics the actual process of the laying of the egg is not affected—the layability of the hen is merely increased. The chicken feed never directly or indirectly reaches the eggs, which are the products shipped in interstate commerce and serves only to increase the inherent laying power of the hen.

So far as we are able to determine we believe this to be a case of first impression.

In the Field Examiner's Intermediate Report he relied on *McComb v. Super A Fertilizer Works, Inc.*, 155 Fed. (2d) 824; *Roland Electrical Company v. Walling*, 326 U.S. 657, and *Hollow Tree Lumber Company*, 91 N.L.R.B. 113. We submit the cases cited are distinguishable in fact from the case at bar. In the *McComb* case the product evidently was applied to the crop; in the *Roland* case the employees worked on electrical equipment which was itself in interstate commerce and in the *Hollow Tree* case lumber was processed into other products which went into interstate commerce.

It is respectfully submitted under the peculiar circumstances of the case that the operations of the employer, he not being actually physically engaged in interstate commerce, are not such as would have a pronounced or any effect on commerce.



**STATEMENT OF THE FACTS IN SUPPORT OF  
SECOND SPECIFICATION OF ERROR.**

The second specification of error is that the Board erred in requiring the Employer to cease and desist from refusing to collectively bargain and affirmatively requiring him to bargain with the Union as the representative of his employees in the unit.

The Employer is a small operator. At most he does not employ over eight or nine employees. He had no legal advice during the inception of the matter until it progressed to the point where a complaint issued.

The Intermediate Report of the Field Examiner quite fairly states the facts. It reads in part as follows:

“On or about September 26, 1950, having secured an authorization card from Stovall (an employee), Gamble and Hannifin called upon the Respondent at the plant. Zall was advised that the Union planned to organize his employees. The testimony with respect to the conversation that ensued is not in conflict on material matters. Gamble's detailed version of it, which I credit, reads as follows:

‘He said that his plant was like a big family and that whenever he had any trouble in the plant why he went out and adjusted them and he said that he was a man of few words and he laid his cards on the table and says, “I don't want a union here and my people do not need a union.” And I stated to him that I could appreciate his position, now not knowing too much about the principles and policies of the

organization, but after we had got better acquainted, why he would be more satisfied. And he says, "I have stated my position, we do not need a Union in this plant." ' (Tr. p. 24.)

"Mr. Zall testified:

'My first knowledge that Mr. Gamble or Mr. Hannifin were in my premises was on September 26, 1950. They came into the office and introduced themselves and brought up the subject of a possible contract between me and themselves as representing the men, and words to that effect, and I told them it was a one man business and that being a one man small business that we had gotten along fine without any union representation, that we were getting along fine and that I personally was not interested in having a union contract negotiated for (Tr. pp. 155 to 156).

'They gave me what they called a master contract to look over. I told them that as far as I was concerned personally, that I didn't particularly need a union to negotiate with.

'On the second or third of October, they were back again. I had a conversation out on the sidewalk with them. Mr. Gamble and Mr. Hannifin stated that they would like to negotiate, and I told them I wasn't interested in negotiating, and then they said, I believe, that in that case we would have to have an election, and I said—which was all new to me, I didn't know what they particularly meant by that, and he explained to me that if they had authorization cards from thirty per cent of the men, *that they could file with the NLRB for an election, that if they won 50% of the votes that they*

would then be the bargaining agent for the men. They were just getting ready to leave, almost in their car when he explained that to me, and I said, "Well go ahead and file for your election."

'I asked him when he told me—he then told me—I then asked him "Well, do you have 30% of the votes, authorization votes in this establishment?" and he said, "Yes". And I said, "Well, may I see the cards, or will you tell me the names of those who authorized you to say that?" And he said, "No", he wouldn't. I don't know the exact words he used but he said no, he wouldn't. That was it. He wouldn't tell me or show me who they were.

'Q. Well, on that day, when earlier in the conversation you didn't need a union or words to that effect, *at that time you didn't even ask his verification that he had 30% authorization?*

'A. *I didn't have the slightest inkling that he was prepared to negotiate.*' (Tr. pp. 156 to 158.)" (Italics ours.)

Again quoting from the Intermediate Report:

"On October 3, 1950, after having secured designation cards from a majority of the Respondent's employees, Gamble and Hanifin returned to the plant; they met the Respondent outside the plant office and held a conversation with him on the sidewalk before the front entrance. Gamble's testimony, which I credit, with respect to this conversation reads as follows:

'I asked Mr. Zall if he had read and studied the contract, he said, "Yes", he had; I asked

him what he thought of it and he said he thought it was a very good contract, but that was one man's opinion. *I asked him if he would consent to a joint election which was customary between unions and employers for the purpose of recognition of the union as his employees' representative.* He stated that he had already previously stated his position that he did not want a Union in the plant. *I asked him if he would consent to an election if we had over thirty per cent \* \* \* thirty per cent of the membership signed up.* Signed up means the authorization cards. He says, "Have you got them?" I said, "Yes". He said, "Let me see them". I said, "Oh, no." I said, "That is for the Board and if the Board decides to let you see the authorization cards, that will be another matter." He stated again that he had previously made himself known on this matter and at that time we should leave and he went into the plant and we left the premises.' "

Gamble also testified, credibly, that Zall, in the course of the conversation, had invited him to go ahead and petition for an election, but stated that his good relations with the Union would cease when it had its election. *The Union, in fact, did file a petition for an election on October 4, 1950; the petition was withdrawn, however, on the 16th of the month* (Tr. pp. 25 to 26).

There were seven employees within the unit. Five signed so-called "Authorization and Application for Membership Cards". The testimony of the organizer was that two additional employees also signed the

cards but he did not see fit to bring the cards in before the Trial Examiner. The two employees were not called as witnesses.

The General Counsel called only three of the five. Two of the three testified that they understood that their signatures were for the limited purpose of permitting the Union to file a petition and bring about an election (Mathews Tr. p. 141). The other has not been made a part of the transcript.

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**ARGUMENT IN SUPPORT OF SECOND  
SPECIFICATION OF ERROR.**

As the facts show, the Employer is a small operator. The very nature of his operations and the fact that they were limited to sales inside the State of California would indicate to him as a layman that he was not subject to the provisions of the Labor Management Relations Act. When the organizers called on him there never was any suggestion by either that he was engaged in interstate commerce. The question never arose. If in fact by reason of these operations and the "Dollar Formula" adopted by the Board, he was under its jurisdiction (which hypothesis we earnestly deny) he certainly did not know it, either in fact or in law and such violations of the Act as the Board has found occurred were certainly innocently done.

The serious question here involved is whether the Employer was ever faced with a specific request to recognize and bargain with the union. A clear and

unequivocal demand for recognition is of course the true basis for a claim of violation.

In the *Solomon Company*, 84 N.L.R.B. 26 and in *National Labor Relations Board v. Valley Broadcasting Company*, 189 Fed. (2d) 582 (Sixth Circuit, June 1, 1951) it was held that in the absence of a clear cut demand presented to the employer to bargain, the petition of the Board to enforce an order requiring the employer to desist from refusing to bargain would be dismissed. The latter case is so strikingly similar on the facts that we have taken the liberty of making a rather full digest of it which is attached hereto, marked Appendix "A".

On September 26, 1950, when Gamble and Hanifin walked into the Employer's plant they were utter strangers to him. He had never seen them before. *They then had only one employee, Stovall signed up.* There was no claim made at that time that the Union represented the employees. As a matter of fact, as the Examiner puts it, "Zall was advised that the Union planned to organize his employees." He might have been "effectively put upon notice with respect to the Union's desire to negotiate as the representative of his employees" but not even the Union contends that on that day it had any authority except from one employee. The only fair intendment from the conversation quoted is that the Union was intending to organize the plant if it could and if it could it would probably propose a contract somewhat similar to the "Master Agreement".

On October 3, 1950, the two organizers returned and other than a passing reference to the contract the substance of the conversation went to the question of an election and the alleged fact that they had the required 30% for that purpose. They asked the Employer if he would consent to the election (though why that would be necessary, if they had the necessary consents, is hard to see) and when he asked them to see the consents he was refused and brushed off with the statement, "That is for the Board and if the Board decides to let you see the Authorization Cards that will be another matter." There was not a single indication any place in the conversation that the Union had the required majority or that based on any claim of such majority they were demanding, requesting or requiring that the Employer should bargain with them.

There is nothing in the record as we view it, which can justify any conclusion that the Employer intended to refuse to negotiate if negotiations were ever presented to him. He was certainly entitled to state his personal opinion that he didn't want a Union in his plant and that his people did not need a Union. That is all he ever said. He did not say, directly or indirectly, by implication or otherwise, that he would never negotiate with an organization representing the requisite percentage of his employees.

While the Examiner found that there was a sufficient demand in which he is sustained by the Board, nonetheless he did have a doubt in his mind as to

compliance with the requirement. In his Intermediate Report he says:

“Ordinarily, it is true, an employer is not required to recognize and bargain with a Union until he receives a request for such recognition or the initiation of negotiations from the labor organization. (NLRB v. Columbian Enameling and Stamping Company, 306 U. S. 292.) *And the record, in its present form, does give rise to some doubt with respect to the Union’s compliance with this requirement.* It did not, in conformity with its usual practice, dispatch a letter to the employer advising him of its status as a majority representative and requesting a conference for the purpose of initiating negotiations.” (Tr. p. 29.)

Under the record as it stands, we submit that the Employer under the circumstances was not faced with a demand to bargain and consequently could not refuse to accede to the request.

We realize that the motives under which an employee signs an authorization card may be of no interest in determining the question of representation. However, in this particular case the testimony of the employees is such that it certainly supports the conclusion that when the organizers called on the Employer they had nothing in mind but an election. The testimony shows that five of the employees signed the authorization cards. The organizer claimed two additional employees’ authorizations which were not introduced into evidence, nor were the employees called



as witnesses. The General Counsel called only three of the five who had signed the cards. Two of the three testified that they understood their signatures were for the limited purpose of permitting the union to file a petition and bring about an election.

We submit that was the purpose the organizers had in mind when they called upon the Employer.

It is the position of the Employer that he is not subject to the jurisdiction of the National Labor Relations Board. If the contrary is ultimately determined to be the final result, then his position is best summed up in the words of the Honorable Abe Murdock, who in dissenting in part said:

“It is axiomatic that a refusal, particularly an employer’s refusal to recognize and bargain with a Union, must be preceded by a specific request. The Board has heretofore characterized such a request as ‘a clear and unequivocal demand for recognition.’ ” (Citing the *Solomon Company*, 84 NLRB 26 and *NLRB v. Valley Broadcasting Company*, 28 LRRM 2148.)

“An examination of the facts in the instant case reveals, as the majority concedes, no evidence that the Union at any time specifically requested the respondent to recognize it as the majority bargaining representative of his employees. Moreover there is no evidence that the Union representatives, who met twice with the respondent, informed him that they were authorized by a majority of his employees to bargain on their behalf. Rather, it is apparent from the very testimony of the Union agent, Gamble, that on

October 3, 1950, the Union claimed only 'over 30% of the membership signed up.' The majority, however, are satisfied with Gamble's conversation with respondent on October 3, 1950, together with the language of the general recognition clause contained in the 'Master Agreement' which the Union had left with the representative to 'study', constitute a sufficient request and claim to majority representative status. But the evidence, according to the credited testimony of the Union's representative, reveals merely that the Respondent was put on notice that the Union was organizing his plant and was requesting him to agree to a consent election. It was in this context that Gamble, the Union agent, left the blank contracts with Respondent, expressing sympathy for the Respondent's anti-union position and requesting that the Respondent did not know 'too much about the principles and policies of the organization.' " (Tr. p. 48 to p. 50.)

In footnote 12 Mr. Murdock says:

"Although I agree with the Trial Examiner's findings that the Union made no claim to majority status, I cannot agree with its further finding that to do so would have been 'futile'. The record will not support a conclusion that the Respondent had demonstrated an inflexible determination to have no dealings with the Union. Indeed, he accepted the contract, read it, and subsequently told Gamble he thought it was 'a good contract.' Under these circumstances, it was incumbent upon the Union to speak up and state its claim to a majority and make a request to

negotiate a contract so providing, if it was actually requesting anything more than a consent election agreement.” (Tr. p. 50.)

Mr. Murdock proceeds further in his Opinion:

“The majority stress the Respondent’s testimony that he interpreted the remarks of Gamble as an attempt to negotiate. But words in the mouths of inexperienced witnesses are not words of art. It is clear that Gamble wanted to negotiate a consent election agreement. It is not clear, and I do not think the Board should so hold, that the Union was also requesting immediate recognition as the bargaining representative of the Respondent’s employees.” (Tr. p. 50.)

Then in footnote 13 Mr. Murdock says:

“I cannot agree with the majority that the Respondent’s use of the word ‘negotiate’ in his testimony means ‘collective bargaining.’ Gamble’s testimony, which the Respondent agreed was accurate, and which the Trial Examiner credits, reveals that Gamble said: ‘I asked him (Zall) if he would consent to an election if we had over thirty per cent’. The Respondent asked to see the authorization cards and Gamble refused. It was then, according to Gamble’s credited testimony, that the Respondent said: ‘Go ahead and have your election.’ I interpret the testimony of the Respondent, cited in footnote 7 of the majority’s opinion, to be in accord with Gamble’s version of the conversation between them.” (Tr. p. 50.)

Mr. Murdock completes his Opinion and says:

“While I fully agree with the majority that the Respondent’s conduct following his conversation with Gamble on October 3, 1950, was in violation of the rights of his employees under the Act, I do not believe that such conduct may properly be substituted for the requirement that a union must clearly and affirmatively make known to an employer that it is the majority bargaining representative of his employees and desires immediate recognition for the purposes of collective bargaining. In my opinion, this requirement is a condition precedent to a finding that an employer had refused to bargain with a labor organization. “Accordingly, I would dismiss the allegation in the complaint that the Respondent has refused to bargain within the meaning of Section 8(a)(5) of the Act.” (Tr. p. 50 to p. 51.)

---

### CONCLUSION.

We respectfully submit that the petition of the Employer should be granted and that of the Board denied.

The Employer was not within the jurisdiction of the Board and in any event was not faced with a clear-cut demand to bargain.

If jurisdiction is to be assumed and the Board’s decision affirmed the Employer will be required to bargain with the Union.

As a practical matter, we wish to inform the Court that only two of the employees mentioned are still with the Employer. Should the decision of the *Valley Broadcasting* case be followed and no violation of Sec. 8(a)(5) be found and the Union continue to maintain its position that it is the bargaining agency, either party then might petition for certification and should the Union prevail in an election, the parties would approach the conference table in full realization of their respective positions and in what we feel would be mutual confidence.

Dated, Marysville, California,

April 28, 1952.

Respectfully submitted,

RICH, CARLIN & FUIDGE,

*Attorneys for Petitioner,*

*Sam Zall.*

(Appendix "A" Follows.)



## **Appendix A.**





## Appendix "A"

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*National Labor Relations Board v. Valley Broadcasting Company*, 189 Fed. (2d) 582. (Sixth Circuit, June 1, 1951.)

The petitioner prayed enforcement of its order requiring the respondent, the owner and operator of a radio station at Steubenville, Ohio, to cease and desist from refusing to bargain with a certain union as the exclusive representative of its announcers and to refrain from interfering with its employees in the exercise of their rights of self-organization and to take specified affirmative action.

Respondent was admittedly engaged in interstate commerce. Laux was its General Manager; Troesch, his assistant. Hirsch, the union representative, held meetings with the announcers with the result that seven signed applications for membership. In addition, the announcers personally requested the union representative to proceed at once to bargain.

From his office some forty miles away Hirsch phoned Laux the next day but the latter being away, talked to Troesch, informing him he was a representative of the Union, that the announcers had signed the application blanks, that the Union had been designated bargaining representative, and that unless the respondent recognized the Union it would file a petition for certification.

Upon being asked categorically if he would recognize the Union, Troesch answered that he would not. The Union filed a petition for certification but later withdrew it.

About a week later at a meeting of the announcers and at a time when both Laux and Troesch knew the announcers had signed the applications Troesch brought out a contract which the respondent had with its engineers and said that the engineers were pleased with it "and that he would like to do the same for us"; "that it was a good contract; and it gave us security over a period of three years" and that "if that contract looked acceptable to us, we would have one made on a similar structure, including periodic raising and hiring and firing clauses to be included".

One of the announcers asked Troesch, "Why are we going through looking at any other kind of a contract when we have these A.F.R.A. application blanks and all those who were present have signed and we are interested in becoming members of the organization?"; to which Troesch replied, "Why should we call in an outsider?"; he said, "We are one small family and we can handle our own problems without calling in someone else".

Further conversation occurred between Troesch and the announcers concerning their membership in the Union and Troesch said he would agree to any kind of an agreement except an A.F.R.A. agreement.

After the designation of the Union as the agent of the announcers their pay scale was raised 10¢ an hour. Thereafter Troesch offered them a contract setting out new wage schedules with certain beneficial improvements and while the contracts were not signed, they were accepted and the Union plans abandoned. One of the announcers then wrote the Union a letter advising that they no longer wished to be represented by the Union.

Some months later, at a conference between Hirsch, Laux, Troesch and Berkman, President of the Respondent, Hirsch renewed his request for recognition, which was definitely refused.

The Court says:

“Such in substance are the evidential facts found by the trial examiner and confirmed by the Board. The Board found that the conduct of Respondent through its agents, Laux and Troesch constituted a violation of Sec. 8 (a) (1) of the Act and we concur \* \* \*” (Page 585.)

“After a careful examination of the record we are unable to say that there was substantial evidence that the Union through Hirsch ever presented respondent with a clear demand to bargain. On this point we agree with the dissenting member of the Labor Board, Mr. Murdock, \* \* \*” (Page 586.)

“Finally, our conclusion is that insofar as petitioner seeks to establish a violation of Section 8 (a) (5), its petition is dismissed, but in all other respects a judgment will be entered.”



No. 13031

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**SAM ZALL, AN INDIVIDUAL D/B/A SAM ZALL MILLING  
Co., PETITIONER**

**v.**

**NATIONAL LABOR RELATIONS BOARD, RESPONDENT**

---

**ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT  
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

---

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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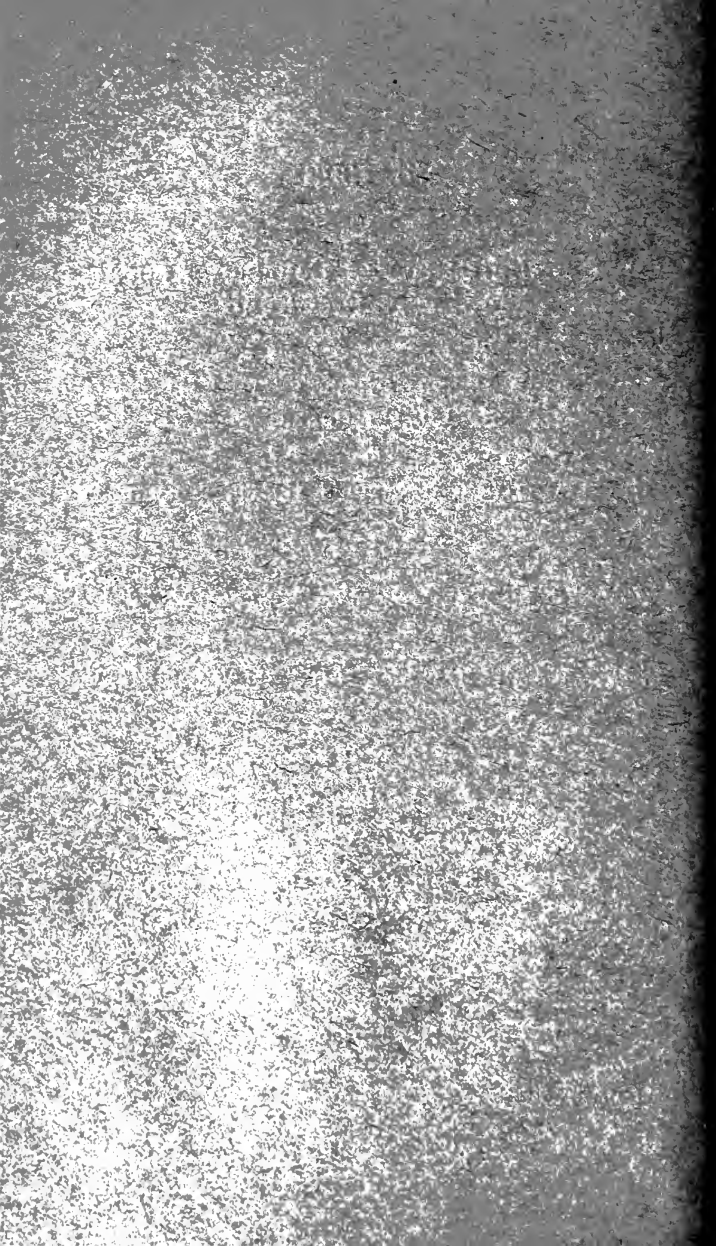
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**FILED**

**JUN 13 1952**



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*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

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ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT  
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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**JURISDICTION**

This case is before the Court upon petition of the Sam Zall Milling Co. to set aside, and cross petition of the National Labor Relations Board for enforcement of, a Board order issued against the Company on June 29, 1951, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Sec. 151, *et seq.*).<sup>1</sup> The Board's decision and order (R. 39) are reported at 94 NLRB 1749. This Court has jurisdiction under Section

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<sup>1</sup> Relevant portions of the Act appear in the Appendix, *infra*, pp. 24-26.

10 (e) of the Act, because the unfair labor practices in question occurred within this judicial circuit in the course of the Company's operations in Marysville, California.

#### STATEMENT OF THE CASE

##### I. The Board's findings of fact and conclusions of law

Briefly, the Board found (R. 41-45) that the Company violated Section 8 (a) (5) of the Act by refusing to honor the Union's (American Federation of Grain Millers (A. F. of L.)) request for bargaining and by dealing directly with its employees and unilaterally changing the terms of employment despite the fact, known by the Company, that the employees had selected the Union to represent them. The Board found further (R. 40) that the Company violated Section 8 (a) (1) of the Act by interrogating its employees concerning their union affiliation, by granting them benefits and by negotiating directly with them concerning terms of employment for the purpose of inducing them to abandon the Union.

The facts as found by the Board, and as shown by the evidence, may be summarized as follows:<sup>2</sup>

##### A. The Company's operations

Zall is engaged in the production and sale of animal and poultry feeds in Marysville, California (R. 67-68). During all relevant periods he purchased,

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<sup>2</sup> In the following statement, record references preceding the semicolon are to the Board's findings; references following the semicolon are to the supporting evidence. The symbol "R." refers to the printed transcript of Record, referred to in the Company's brief as "Tr.". The symbol "S. R." refers to the printed Supplemental Transcript of Record.

grains, alfalfa, concentrates and other materials valued at more than \$250,000 annually, of which more than \$90,000 was shipped to him from points outside the State of California (R. 61-62).

The total annual sales of the Company approximated \$500,000 in value during the periods here involved. All of these sales were made in California to purchasers within the State. However, Zall's largest single customer, the Vantress Hatchery and Breeding Farms, was itself engaged in interstate trade. In 1949, Zall sold to the Vantress Company poultry feeds valued at more than \$75,000. The Vantress Company used these feeds in the production of poultry and eggs at its farm near Marysville. During 1949 and 1950 the Vantress Company sold and shipped annually to points in the United States outside of California, hatching eggs valued at more than \$60,000 (R. 62-67).

Upon these facts the Board found, contrary to the Company's view, that its operations affect commerce within the meaning of the Act, and that it would effectuate the purposes of the Act to assert jurisdiction over the case (R. 40, n. 1).

#### **B. The unfair labor practices**

##### **1. *The Company's employees designate the Union as their representative***

During the fall of 1950 Zall employed seven production workers<sup>3</sup> (R. 21; 68-79). In September and October 1950, at the solicitation of Union organizers Gam-

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<sup>3</sup> The Board found that these seven employees constitute a unit appropriate for the purposes of collective bargaining (R. 41, n. 4, 18-21). The Company does not contest this finding (R. 54).

ble and Hanifin, five of the seven employees signed cards applying for membership in the Union and designating the Union as their representative for collective bargaining purposes (R. 21-24; 88-93, 138-140, 143-145, S. R. 195-196).

## *2. Zall refuses to bargain with the Union*

On September 26, at the inception of the Union's organizing activities, and when only one employee had signed an application card, Union organizers Gamble and Hanifin called upon Sam Zall at the plant. The organizers told Zall in substance that they planned to organize his shop. Zall said, "I don't want a union here and my people do not need a union." Gamble told Zall that he would change his views after they were better acquainted. In the course of the conversation Gamble gave Zall a blank copy of the Union's Master Agreement which the Union regularly used as a basis for negotiation, and asked Zall to study it so that they could discuss it a week or two later. Zall agreed to this and the conversation ended (R. 24; 85-89, 108-109, 155-156).

About a week later, on October 3, having secured designations from a majority of the employees, Gamble and Hanifin returned to the plant and told Zall they "would like to negotiate" (R. 157). Zall replied that he "wasn't interested in negotiating" (*ibid.*). Gamble thereupon asked him if he would consent to an election if the Union had over 30 percent of the employees signed up. Zall parried this question by asking whether the Union did in fact represent that percentage. Gamble said that it did, but when asked to reveal the names of the members he stated that he would do so only under

the auspices of the Board. Zall thereupon declared that his position on unions was unchanged and the conversation ended (R. 25-26, 41-42; 93-95, 156-159).

**3. After learning of his employees' union affiliation Zall bypasses the Union, engages in direct negotiations with the employees and grants them substantial benefits in order to induce them to abandon the Union**

Directly after Gamble and Hanifin left the plant on October 3, 1950, Zall asked each of his employees whether they had signed Union cards (R. 26, 40; 160-161, 126-127, 138-139, 144; S. R. 199-200, 205-206). All of the three employees who were witnesses at the hearing testified that they told Zall that they had signed cards (R. 26, 43; 138, 144-145; S. R. 199-200, 205-206) and one of the three told Zall that he had seen the "rest of" the employees sign up. (S. R. 205-206).<sup>4</sup> The Company thereupon proceeded to side-step the Union and negotiate directly with the employees. During the next few days, Cotton, Zall's supervisor in charge of production (R. 69-70), held conversations with the employees to inquire about their grievances and learn what they wanted in terms of wages, hours and other conditions of work. On October 5, as a result of these talks Cotton drew up a rough draft of a contract by which the Company agreed to meet various employee demands. The same

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<sup>4</sup> Employee Adams testified as follows in this connection (S. R. 205-206): "Well he [Zall] come out and asked me, he says, 'Did you sign that card?' I said 'yes.' He said, 'Well, you want the Union.' I said, 'Well its not me, the rest of them signed, too.' He said 'Well you and Matthews are the only ones who said you signed.' So I told him, 'I was there, I know that the rest of them did, too.' So he went up to where Skinner was working and I imagine to ask him."

day, he discussed this document at a meeting with the men. They indicated that it was satisfactory. The next day, Zall himself read the draft to the men. In the course of the ensuing discussion Zall said, "If you sign this contract then you boys know how I would like to have you vote" (R. 147). After the men approved, Zall had the draft contract typewritten. It was signed by Zall in his office and then circulated among the employees for their signatures. Five of the seven men signed the document (R. 26-28, 43-44; 136-137, 127-130, 145-146, 149-150, 158-161; S. R. 196-199, 203-205).

By this document (R. 136), which was captioned "Contract," Zall agreed to increase the wages of the signatory employees to the level paid by General Mills Corp., another mill in the nearby area (R. 27; 129-130). Zall also agreed to permit employees to work in excess of forty hours per week, thus enabling them to earn overtime pay. This represented a departure from Zall's earlier practice of meeting emergency situations by bringing in part-time workers from the outside (R. 27; 79-81, 133-135). The contract was put into effect immediately and the employees received the increased wage rate, effective as of October 2 (R. 28; 127, 130).

Following these events, the Union on October 16 withdrew a petition for an election which it had filed with the Board on October 4 (R. 26; 93-96) and filed, instead, a charge that Zall had committed the unfair labor practices here involved.



## II. The Board's conclusions

The Board concluded (R. 28-31, 41-44) that the Union had been properly designated as the employees' statutory bargaining representative, and that Zall had refused to recognize and bargain with the Union, in violation of Section 8 (a) (5) of the Act, by refusing to honor the Union's bargaining request, and by bypassing the Union and bargaining on an individual basis with the employees and unilaterally changing wages and other conditions of employment as a result of such individual negotiations. The Board also found (R. 32, 40), independently of the above finding, that Zall's direct negotiation with the employees and grant of benefits, in the face of the Union's designation as exclusive bargaining representative, as well as his questioning of the employees concerning their union activities, all for the purpose of inducing the employees to abandon the Union, constituted interference, restraint, and coercion in violation of Section 8 (a) (1) of the Act.<sup>5</sup>

## III. The Board's order

The Board's order (R. 45-48) requires Zall to cease and desist from refusing to bargain collectively with the Union as the exclusive representative of his employees, cease and desist from giving effect to the agreement made with his employees in order to forestall bargaining, and from in any other manner, inter-

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<sup>5</sup> The Board's decision that Zall violated Section 8 (a) (1) of the Act was unanimous (R. 48). Since Board Member Murdock felt that the Union had not made a proper request for bargaining, he dissented from the Board's finding that respondent had refused to bargain upon request, in violation of Section 8 (a) (5) (R. 48).

fering with, restraining, or coercing his employees in the exercise of their rights under Section 7 of the Act. Affirmatively, the Board's order requires Zall, upon request, to bargain collectively with the Union and to notify the individual employees that he will not enforce the individual agreements for the purpose of interfering with collective bargaining, and finally to post the usual notice.

## ARGUMENT

### I

**The Board properly held that the Zall Milling Company is engaged in commerce within the meaning of the Act**

The Board asserted jurisdiction over Zall on the basis of the fact that it sells annually, to the Vantress Corp. in California, feeds valued at \$75,000, and that the Vantress Company uses this feed in the production of hatching eggs which it ships in interstate commerce (R. 40, n. 1). While conceding that its largest feed customer, the Vantress Company, produces and sells hatching eggs in interstate commerce, Zall argues that the Board lacks jurisdiction over it because the feed itself never enters the channels of interstate trade but loses its character as feed when it is fed to the hens of the Vantress Company in California. As Zall puts it, "The chicken feed never directly or indirectly reaches the eggs, which are the products shipped in interstate commerce and serves only to increase the inherent laying power of the hen." (Br. p. 6.)<sup>6</sup>

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<sup>6</sup> Zall states (Br. p. 4) that the Vantress Company is not subject to the jurisdiction of the National Labor Relations Act and cites as a record reference "Tr. p. 67." Nothing at the page cited

Assuming the biological accuracy of Zall's contention,<sup>7</sup> it is plain that he nevertheless falls well within the area of the Board's jurisdiction. It is elementary law that the Act reaches all operations which, though confined to a single state, have an effect upon interstate commerce. Sections 1, 2 (5) and (6) of the Act; *N. L. R. B. v. Fainblatt*, 306 U. S. 601, 604; *N. L. R. B. v. Sunshine Mining Co.*, 110 F. 2d 780, 784-785 (C. A. 9), certiorari denied, 312 U. S. 678; *N. L. R. B. v. Townsend*, 185 F. 2d 378, 382 (C. A. 9), certiorari denied, 341 U. S. 909; *N. L. R. B. v. Cleveland Cliffs Iron Company*, 133 F. 2d 295, 299-300 (C. A. 6). Since, as respondent admits (Br. pp. 4-5) his feed enhances the productive power of the Vantress hens, it follows that a curtailment of the supply of feed by a labor dispute at respondent's plant would discourage the output of eggs at Vantress and thereby affect commerce.

Thus, even if it be true, it is irrelevant that neither the feed nor its chemical components enters the record or in the record warrants this statement. Perhaps, he is referring to the fact that the General Counsel stipulated (R. 64) that Mr. Vantress, if called, would "testify that he is not subject to Wages and Hours Law." Zall does not explain, how this fact, even if true, could affect the Board's jurisdiction. The Board noted (R. 17) that nothing in the Act suggests "that Congress intended to exempt from the Board's jurisdiction employers engaged in *industrial activity* necessary to the production of agricultural commodities which move in commerce." [Emphasis added.]

<sup>7</sup> It is highly questionable whether Zall's position in this regard is scientifically correct. While undoubtedly the feed undergoes chemical and physical change in the process of digestion, the accepted scientific fact is that the egg is formed from the components of the feed. United States Department of Agriculture, *Nutritive Requirement and Feed Formulas for Chickens*, Circular No. 788.

streams of commerce in the form of the egg. The product itself need not enter the flow of interstate trade, it is enough that, as here, the product or service constitutes an essential factor in the production of other goods which do move in commerce. Thus, production of water, gas, electricity, and fertilizer for purely local consumption has been held to come within the commerce provisions of the Act and other Federal statutes, where these products or services were assimilated locally by companies engaged in production for interstate commerce. *Roland Electrical Company v. Walling*, 326 U. S. 657, 663; *Reynolds et al. v. Salt River Valley Water Users Assn.*, 143 F. 2d 863, 865-867 (C. A. 9); *Consumers Power Co. v. N. L. R. B.*, 113 F. 2d 38, 39-41 (C. A. 6); *McComb v. Super-A-Fertilizer Works*, 165 F. 2d 824, 825-828 (C. A. 1). By the same token, production of feed, which is consumed locally by hens which produce hatching eggs for interstate shipment, affects commerce within the meaning of the Act.<sup>8</sup>

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<sup>8</sup> Zall imported close to \$100,000 worth of materials from out of state (*supra*, p. 3). Although the Board could have properly asserted jurisdiction on the basis of this fact alone (*N. L. R. B. v. Denver Building Council*, 341 U. S. 675, 683-684; *N. L. R. B. v. Cowell Portland Cement Co.*, 148 F. 2d 237, 241-242 (C. A. 9), certiorari denied, 326 U. S. 735; *N. L. R. B. v. Ellis-Klatscher & Co.*, 142 F. 2d 356, 357 (C. A. 9)), it does not as a matter of policy rely on the intake factor unless the value of the goods received is \$500,000 or more. See "N. L. R. B.'s Standards for Exercise of Jurisdiction," 26 L. R. R. M. 50; Sixteenth Annual Report of the National Labor Relations Board, 1951, pp. 15-16.

## II

## Substantial evidence supports the Board's finding that the Company violated Section 8 (a) (1) and (5) of the Act

### A. The violation of Section 8 (a) (1)

As we have already noted (*supra*, p. 7), the Board found that independently of its refusal to bargain with the Union, in violation of Section (a) (5) of the Act, the Company, in violation of Section 8 (a) (1), interfered with its employees' right to organize and bargain collectively, by interrogating them concerning their union affiliation, and by dealing directly with the employees and granting them benefits for the purpose of inducing them to abandon the Union (R. 40-43). The Company does not challenge the propriety of the Board's finding with respect to the violations of Section 8 (a) (1). It filed no exceptions to the Trial Examiner's finding that it committed these violations (R. 54) nor does it argue these matters in its brief to this Court. Hence, under Section 10 (e) of the Act<sup>9</sup> and well established principles governing appellate procedure<sup>10</sup> this issue is not before the Court. In any event there is little doubt that Zall's admitted interrogation, direct negotiations, and grant

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<sup>9</sup> This Section provides that "No objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." See *Marshall Field & Company v. N. L. R. B.*, 318 U. S. 253, 255; *N. L. R. B. v. George Noroian Company*, 193 F. 2d 172, 173 (C. A. 9).

<sup>10</sup> *Mason v. Anderson-Cottonwood Irrigation District*, 126 F. 2d 921, 922 (C. A. 9); *N. L. R. B. v. Kentucky Utilities Co.*, 182 F. 2d 810, 814 (C. A. 6).

of benefits, coming as they did, fast on the heels of the union's designation as bargaining representative by the majority of the employees, constituted interference in violation of Section 8 (a) (1) of the Act.<sup>11</sup> The remaining issue before the Court is whether the Board correctly found that the Company also failed to fulfill its bargaining obligation under Section 8 (a) (5) of the Act. We now turn to that question.

**B. The Company's failure to fulfill its bargaining obligation under  
Section 8 (a) (5)**

The Board found (R. 31), as we have seen, that the Company violated its obligation to bargain in two respects—it failed to honor the Union's request to bargain and, in addition, bypassed the Union and engaged in direct dealings with its employees at a time when it knew that the Union represented a majority of the employees.

**1. Zall's refusal to honor the Union's request for bargaining and recognition  
violated Section 8 (a) (5)**

With respect to the refusal to honor the Union's request for bargaining, the issue is whether substantial evidence supports the Board's finding that the Union, in fact, made such a request. We submit that the majority of the Board correctly so found (R. 41-44).

At their first meeting with him, in late September, the Union agents did not merely inform Zall that they planned to organize his employees. They left with

<sup>11</sup> *Medo Photo Supply Corp. v. N. L. R. B.*, 321 U. S. 678, 683; *J. I. Case Company v. N. L. R. B.*, 321 U. S. 332, 337; *May Department Stores Co. v. N. L. R. B.*, 326 U. S. 376, 384-385; *N. L. R. B. v. Andrew Jergens Co.*, 175 F. 2d 130, 136 (C. A. 9), certiorari denied, 338 U. S. 827.

Zall a copy of the "Master Agreement," which the Union regularly used as a basis for negotiations and which, with variations to suit each particular case, was the contract the Union normally executed with employers whose workers it represented (R. 42). Moreover, Zall agreed to study the contract so that they could meet again within the next two weeks for further discussion (R. 25; 88). Zall himself testified that the Union agents "brought up the subject of a possible contract between me and themselves as representing the men, and words to that effect," but that he told them that he "personally was not interested in having a union contract negotiated for" (R. 155-156).

It was against this background that the parties met again on October 3, after the Union had been designated bargaining representative by a majority of the employees. At the latter meeting, as Zall testified (R. 157) the Union agents "stated that they would like to negotiate." Zall, however, again declared that he "wasn't interested in negotiating" (*ibid.*). At this point the Union agents said that "in that case [they] would have to have an election" (R. 42; 157) and asked Zall if he would consent to one (*supra*, p. 4). As the Board found (R. 43), the Union's action in this respect is not inconsistent with the conclusion that the Union agents were seeking immediate recognition when, at the outset of the October 3 meeting, they asked Zall to negotiate. The Board could reasonably conclude, as it did (*ibid.*), that the Union's suggestion of a consent election, after Zall had declined their request to bargain, was simply "an alternative attempt to achieve recognition without resorting to charges of unfair labor practices."

It was equally reasonable, we submit, for the Board to conclude on all the facts that Zall understood that the Union agents were making a bargaining request when they met with him on October 3. Indeed, the very fact that they had given him the form contract to study, that the contract expressly provided for exclusive recognition of the Union, and that the Union agents upon returning on October 3, declared that they “would like to negotiate,” together with Zall’s admission that he then told the Union representatives that he “wasn’t interested in negotiating,” makes it difficult to reach any other conclusion. Clearly these facts satisfy the statutory requirement of a request to bargain. The very nature of the collective bargaining scheme under the Act precludes any requirement of formalism in the request. The courts have recognized, therefore, that the request need not be in “*haec verba*,” so long as there was one by clear implication.” *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732, 741 (C. A. D. C.), certiorari denied, 341 U. S. 914. All that is necessary is that “the employees must at least have signified to [the employer] their desire to negotiate.” *N. L. R. B. v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 297–298.<sup>12</sup>

The Company, relying on Board Member Murdock’s dissent as to the 8 (a) (5) Finding (see p. 7, n. 5), advances the argument (Br. pp. 13–15) that Zall’s testimony to the effect that the Union wanted to

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<sup>12</sup> In the *Columbian Enameling* case the court held the request inadequate, because, unlike the request here, it was made by two conciliators of the Department of Labor who did not purport, and were completely devoid of authority, to act for the employees.



negotiate must be interpreted as having reference to the negotiation of a consent election agreement, not a collective bargaining agreement. This interpretation, however, hardly squares with Zall's testimony. Zall testified as follows (R. 157):

I don't recall word for word what was said. Mr. Gamble or Mr. Hanifin stated that they would like to negotiate, and I told them that I wasn't interested in negotiating, *and then they said*, I believe, that in that case we would have to have an election \* \* \* [Italics supplied].

Zall then testified that the organizers explained the election procedure to him and that, as they were getting ready to leave, he said "Well go ahead and file for your election" (R. 157).

In our view, it is difficult indeed to construe Zall's statement at the outset of this conversation that he "wasn't interested in negotiating" as meaning that he was not interested in negotiating a consent election agreement. The discussion of elections came up only after Zall indicated his unwillingness to bargain generally. Moreover, it is extremely unlikely, that Zall could have been referring to negotiation of a consent election agreement, a relatively technical matter, in the light of his own admission that the whole election process was "all new" to him (R. 157).

The other contention advanced by Zall, that he was justified in refusing to bargain because the Union failed to claim and prove its majority status, is altogether without merit and was properly rejected by

the Board (R. 41-44). In the first place, as the Board noted, the Company was effectively put on notice of the Union's claim to majority status by the contract itself, which expressly required recognition of the Union as the sole collective bargaining agent of the employees in question (R. 42; 98).

In the second place, the fact that the Union did not proceed to prove its majority status was by no means the real cause of Zall's rejection of the Union's bid. On the contrary, Zall was motivated by a fundamental opposition to bargaining at all. At both meetings with the Union he stated that he did not need a union and "wasn't interested in negotiating," before any discussion of the Union's representative status arose.

Moreover, Zall, by his later unfair labor practices demonstrated that he never had any intention of bargaining in good faith, regardless of the majority status of the Union. Thus, he promptly interrogated each of the employees and learned first hand, albeit improperly, that the Union was in fact supported by a majority of the employees (*supra*, p. 5).<sup>13</sup> Instead of respecting the Union's status, however, and responding to its bargaining request, Zall immediately set about to destroy the Union's majority by dealing directly

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<sup>13</sup> All three employees who testified, stated without contradiction that they told Zall that they had joined. One of these three testified that he told Zall that he had seen the other employees also sign. Zall never denied that the employees he had questioned told him they had joined the Union. Instead he simply stated that upon interrogating the employees he "got his answer" (R. 160-161). The Board could properly conclude that Zall "had reason to know on October 3rd, that the Union actually had been selected as the majority bargaining representative of his employees" R. 43).

with the employees and awarding them benefits he was unwilling even to discuss with the Union. In these circumstances there can be little question but that the Board could reasonably reject, as it did (R. 41-44), Zall's claim that he had a sincere doubt as to the Union's majority and refused to bargain for that reason. *N. L. R. B. v. Bradford Dyeing Assn.*, 310 U. S. 318, 338-340; *N. L. R. B. v. Biles Coleman Lumber Co.*, 98 F. 2d 18, 22 (C. A. 9); *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732, 741-742 (C. A. D. C.), certiorari denied, 341 U. S. 914; *N. L. R. B. v. National Plastic Products Co.*, 175 F. 2d 755, 760 (C. A. 4); *N. L. R. B. v. Consolidated Machine Tool Corp.*, 163 F. 2d 376, 378-379 (C. A. 2); cert. den., 332 U. S. 824; *The Solvay Process Company v. N. L. R. B.*, 117 F. 2d 83, 86 (C. A. 5), cert. den., 313 U. S. 596.

The Company's contention (Br. pp. 14-15) that the employees did not intend to authorize the Union to bargain on their behalf warrants only brief attention. The cards in bold-face type and in plain language designate the Union to act as representative. (R. 102-106.) The Union agent explained the contents of the card to the employees (R. 113, 124-125, 151-152). The Board correctly ruled (R. 22-23, 41), that the employees who signed these cards could not undo the effects of their overt action by testifying that they thought the cards meant something else. *N. L. R. B. v. Sunshine Mining Co.*, 110 F. 2d 780, 790 (C. A. 9), certiorari denied, 312 U. S. 678; *Joy Silk Mills, Inc. v. National Labor Relations Board*, 185 F. 2d 732, 743, certiorari denied, 341 U. S. 914 (C. A. D. C.); *Consolidated Machine Tool Corp.*, 67 N. L. R. B. 737, 739, enforced, 163 F. 2d 376 (C. A. 2), certiorari denied, 332 U. S. 824.

In any event, it is fair to assume even if, as the Company contends (Br. p. 15), the "signatures were for the limited purpose of permitting the Union to file a petition and bring about an election," that the employees' ultimate purpose in seeking such an election was to have the Union represent them. It is extremely unlikely that these employees were authorizing the Union to file for an election so that they could then vote against it.

2. *The Company's direct negotiations with the employees and unilateral change of working conditions violated Section 8 (a) (5) of the Act, even assuming that the Union had not made a bargaining request*

The statutory bargaining obligation not only imposes the affirmative duty to bargain collectively upon request, but in a negative sense it requires the employer to abstain from undercutting the designated representative by direct dealings with individual employees and unilaterally changing terms and conditions of employment. *Medo Photo Supply Corp. v. N. L. R. B.*, 321 U. S. 678, 683, 684.<sup>14</sup>

Once a collective bargaining representative has been designated by a majority of the employees, either party, union or employer, wishing to change the terms or conditions of employment must seek out the other for bargaining concerning the proposed changes. If the Union wishes to negotiate a contract or a change in terms of employment it must, preliminarily, re-

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<sup>14</sup> Accord: *National Labor Relations Board v. Jones and Laughlin Corp.*, 301 U. S. 1, 44; *N. L. R. B. v. Crompton-Highland Mills*, 337 U. S. 215, 255; *N. L. R. B. v. Montgomery Ward & Co.*, 133 F. 2d 676, 681-682 (C. A. 9); *N. L. R. B. v. Andrew Jergens Co.*, 175 F. 2d 130, 136 (C. A. 9), certiorari denied, 338 U. S. 827.

quest the employer to bargain concerning such change, and the employer must, under the law, meet and bargain in good faith. Similarly, if the employer wishes to change terms or conditions of employment, he must request a meeting with the Union which the Union must honor (Section 8 (b) (3)). Hence, it is idle for respondent to argue as to this aspect of the case, that the Union had not requested bargaining, for even if this be true (which we deny, *supra*, pp. 12-15), it does not afford any defense to respondent for its failure to seek out the Union prior to its negotiation with the individual employees and its unilateral initiation of changed terms of employment. Under the controlling authorities, the Company was obligated to make a bargaining request as a prelude to its changing the terms of employment. *N. L. R. B. v. Crompton-Highland Mills, Inc.*, 337 U. S. 217, 223-224; *Allis-Chalmers Mfg. Co. v. N. L. R. B.*, 162 F. 2d 435, 440 (C. A. 7), enforcing 70 N. L. R. B. 348, 369; *Reeder Motor Co.*, 96 N. L. R. B. No. 112, 28 LRRM 1596, and authorities cited *supra* at page 18.

Here, although Zall had been put on notice of the Union's majority status by virtue of the majority clause in the contract and the results of his interrogation of employees, he was still not willing to bargain with the Union. Indeed, the fact that the Union had been designated by the employees seemed to crystallize his opposition to the Union. He promptly sought to induce the employees to abandon the Union by offering to the men directly a contract, where none existed before, providing for increased wages and overtime work. This action was "manifestly incon-

sistent with the principle of collective bargaining" prescribed by the Act, and as the Board found (R. 40-44) constituted a violation not only of section 8 (a) (1) (*supra*, p. 7), but also of Section 8 (a) (5). The *Crompton* case, *supra*, 337 U. S., at pp. 221-222.

### 3. The *Valley Broadcasting* case

The Company relies heavily upon *N. L. R. B. v. Valley Broadcasting Co.*, 189 F. 2d 582 (C. A. 6) (Co. Br. p. 12), in support of its position that the Union here never made an adequate bargaining request. We submit, however, that the *Valley* case is distinguishable on its facts. The Court, in the *Valley* case (at p. 586), found that there was no substantial evidence that "the Union through Hirsch [the Union agent] ever presented respondent with a clear demand to bargain." The Board had also found (87 NLRB, at p. 1144, n. 1) that Union Agent Hirsch had failed to make an adequate request, and relied for its finding of a bargaining request on a statement made by an employee Union member (Teolis) in the course of a meeting with the employer (87 NLRB at pp. 1144-1145). In these circumstances, we believe, it is fair to assume that the Court, in the *Valley* case, was not satisfied that a proper request could be made by a mere employee who had no real or apparent authority to act for the Union. Hence, it found (189 F. 2d, at p. 586), that the Union had never "presented respondent with a clear demand to bargain." Cf. *N. L. R. B. v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 297-298. In the instant case the bargaining request was made by the Union organizers themselves

and hence is not subject to the defect found in the bargaining request in the *Valley* case. In any event, the question of fact here involved must turn upon the particular circumstances of the case itself which, as we have already shown, fully support the reasonableness of the Board's conclusion that the Union clearly acquainted Zall with its desire to bargain collectively on behalf of his employees.

Although the Court in the *Valley* case rejected the Board's finding that the Company had violated Section (a) (5) (189 F. 2d at 586) we feel that its decision stands merely for the familiar proposition that where a union is seeking to negotiate, the employers' corresponding duty to bargain can be invoked only by a proper demand by the union. It does not appear that the Court intended to reject or even considered the proposition stated above (*supra*, pp. 18-20), that an employer's negative duty to abstain from direct dealings with his employees arises, once he learns of the union's majority status, regardless of whether or not the union has made a bargaining demand. Such direct dealings, we submit, violate Section 8 (a) (5) and nothing in the *Valley* case conflicts with this principle. On the contrary the Court's decision appears to sustain it. It stated (189 F. 2d at 587) that:

Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which

the statute has ordained, as the Board, the expert body in this field, has found.

Quoting the Supreme Court's decision in *Medo Photo Corp. v. N. L. R. B.*, 321 U. S. 678, 684, the Court recognized (189 F. 2d, at p. 586) that "it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees . . ."

It is our view that the Court did not consider whether such direct dealings with employees were sufficient to support the Board's bargaining order. To the extent that the decision may be considered as holding such a finding insufficient to support a bargaining order we respectfully disagree with it.

#### 4. *The Board's bargaining order*

The Board's Order (R. 45-48) requires the Company, *inter alia*, to bargain upon request by the Union. This is the traditional manner in which the Board remedies violations of the bargaining obligation embodied in Section 8 (a) (5), whether the violation consists of a simple refusal by an employer to honor a bargaining request or whether the violation lies in the employer's bypassing of the statutory representative and dealing directly with his employees. *N. L. R. B. v. Biles Coleman Lumber Company*, 98 F. 2d 18, 23 (C. A. 9); *Reeder Motor Company*, 96 N. L. R. B. No. 112, 28 L. R. R. M. 1596, 1597-1598.

Moreover, we submit that on the peculiar facts of this case, it is appropriate to require the Company to bargain even if the Court were to find only a violation



of Section 8 (a) (1) of the Act. Since, as we have seen (*supra*, pp. 5-6, 11-12), Zall's illegal inducement of the employees to abandon the Union (in violation of Section 8 (a) (1)), resulted in the destruction of its majority status, we urge that it is entirely equitable to require the Company to bargain with the Union on request, for, absent such a requirement, the Company can disregard the Union until it is able to muster a new majority, and reap the benefit of its own misconduct. *D. H. Holmes Co. Ltd. v. N. L. R. B.*, 179 F. 2d 876, 879-880 (C. A. 5); *International Broadcasting Corporation (KWKH)*, 30 L. R. R. M. 1039, 1040; cf. *N. L. R. B. v. Bradford Dyeing Association*, 310 U. S. 318, 339-340.

#### CONCLUSION

For the reasons stated it is respectfully submitted that the Board's order should be enforced in full.

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JUNE 1952.

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Sec. 151, *et seq.*), are as follows:

### “FINDINGS AND POLICIES

“SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

\* \* \* \* \*

### DEFINITIONS

SEC. 2. When used in this Act—

(6) The term “Commerce” means trade, traffic, commerce, transportation, or communication among the several states \* \* \*

(7) The term “affecting commerce” means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

\* \* \* \* \*

## RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

## UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

\* \* \* \*

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

\* \* \* \*

SEC. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—\* \* \*

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

\* \* \* \*

## REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bar-

gaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

\* \* \* \*

#### PREVENTION OF UNFAIR LABOR PRACTICES

##### SEC. 10. \* \* \*.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter

upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. \* \* \*



No. 13,031

United States Court of Appeals  
For the Ninth Circuit

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SAM ZALL, an individual doing business as Sam Zall Milling Company,  
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent,*

and

NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

vs.

SAM ZALL, an individual doing business as Sam Zall Milling Co.,  
*Respondent.*

CLOSING BRIEF IN SUPPORT OF  
PETITIONER, SAM ZALL.

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*Sam Zall.*

JUN 23 1952

PAUL E. O'BRIEN





**United States Court of Appeals  
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SAM ZALL, an individual doing business as Sam Zall Milling Company,  
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*Respondent.*

**CLOSING BRIEF IN SUPPORT OF  
PETITIONER, SAM ZALL.**

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We have examined the brief for the National Labor Relations Board as the result of which we believe some clarification is necessary on the question whether the Employer was met with a clear cut demand for bargaining and recognition. By the use of generalities the conclusion is drawn that such a demand was made.

It is our position that the opposite occurred.

In order to determine what actually did occur we take the liberty of stating the record on the point in full.

The organizer, Cecil F. Gamble testified that in company with his associate Mr. Hanifin, and at a time when they had a card from one employee only, he met with the Employer on September 26, 1950.

“The Witness. We met Mr. Zall, we stated our position *that we were planning on organizing his employees and starting an organizing drive in this area.* The balance of the conversation was to explain the purposes and principles of the American Federation of Grain Millers and to present him with a contract for his study and approval.

Q. (by Mr. Law). Well, now, let's see. I am not sure that we were getting what was actually said. As I understand it, you went in and told Mr. Zall that you *intended to seek representational rights* for his employees?

A. *That's right.*

Q. And did he make any reply?

A. He said that his plant was like a big family and that whenever he had any trouble in the plant why he went out and adjusted them, and he said that he was a man of a few words and he laid his cards on the table and says, ‘I don't want a union here and my people do not need a union.’ And I stated to him that I could appreciate his position, now not knowing too much about the principles and policies of the organization, but after we had got better acquainted, why he would be more satisfied. And he says, ‘I have stated my position; we do not need a union in this plant.’” (Tr. pp. 86-87.) (Italics ours.)

The Assistant General Counsel then exhibited to him the blank form of contract which he had presented to the Employer and the following ensued:

“Q. Now, did you have any conversation with respect to General Counsel’s Exhibit No. 3 for Identification?

A. This is number 3?

Q. Yes, the proposed contract?

A. No, we didn’t go into any discussion, other than Mr. Zall stated that he would take the contract and study it. I endeavored to make an appointment and he said that he would take it and read it and study and bring it back, and for me to drop back in a week or so and if he liked it he would make an appointment at that time.

Q. And was that all you remember of the conversation on or about September 26th?

A. That is right. We left the premises at that time.

Q. Now, as I understand it, *you told Mr. Zall that you intended to seek to organize his employees.* As of the time of that conversation, had you engaged in any organizational activities among the employees?

A. We had one man, Jess Stovall.” (Tr. p. 88.) (*Italics ours.*)

After testifying that at a later date cards were obtained from other employees the witness reported a meeting between him, his associate and the Employer, on the sidewalk before the place of business on October 3, 1950. His testimony is as follows:

“Now, what was your conversation with Mr. Zall on that occasion?

A. I asked Mr. Zall if he had read and studied the contract. He said, 'Yes', he had. I asked him what he thought of it, and he said he thought it was a very good contract, but that was one man's opinion. *I asked him if he would consent to a joint election which was customary between unions and employers for the purpose of recognition of the union as his employees' representative.* He stated that he had already previously stated his position that he did not want a union in the plant. *I asked him if he would consent to an election if we had over thirty per cent.*

Q. Thirty per cent what?

A. Thirty per cent of the membership signed up. Signed up means the authorization cards. He says, 'Have you got them?' I said 'Yes.' He said, 'Let me see them.' I said 'Oh, no.' I said, 'That is for the Board, and if the Board decides to let you see the authorization cards, that will be another matter.' He stated again that he had previously made himself known on this matter and at that time we should have, and he went into the plant and we left the premises.

Q. You say he stated that he had previously made himself known on this matter. Are you attempting to repeat his words?

A. I was attempting to repeat his words as nearly as I possibly could, yes.

Q. Is that all you remember about your conversation with him?

A. That is all at this time that I can remember.

Q. *Did you discuss petitioning for an election?*

A. *Well, I did discuss petitioning for an election.*

Q. What did you say in that connection?

A. I said to him, I says—but that was after I had made the statement that if we had over thirty per cent of the signatures and he asked me if—we have already gone through that—he says, ‘Go ahead and have your election.’ And he says, ‘That is when our good relations will cease, when you have an election.’ (Tr. pp. 93-94.) (*Italics ours.*)

He further testified that thereafter he filed a petition for an election with the Board which was later withdrawn. (Tr. p. 95.)

On cross-examination he testified that one of the employees, Jess Stovall, had been approached by him and had signed the one card he had in his possession when he first approached the Employer. In this regard the following occurred:

“Q. Let me ask you, was there anything said that the fact of his signature to this card was that there should be an election held as to whether or not your organization or some other organization would represent the employees?

A. Definitely so. That is the procedure of our organization, and it is the purpose of our Recognition Card, is to gain their signature for their Godgiven right to authorize us to petition for an election in the courts of the law.

Q. Now, tell me what you told him about that?

A. I told him that that would be the procedure.

Q. That there would be——

A. We had to have the cards. We had to have their signatures.

Q. For an election?

A. For an election." (Tr. pp. 113-114.)

Further:

"Q. I am sorry, that is not what I asked you. The question I put to you was this, and you can give me a yes or no on it.

When you walked away from the plant on the twenty-sixth of October, 1950 (should read September, 1950) you did not consider the negotiations were at an end, did you?

A. Truthfully, I cannot say that I expected negotiations at *that* time.

Q. *But you were intending to come back and try again?*

A. *After his study and approval.*" (Tr. pp. 119-120.) (Italics ours.)

The testimony of the Employer on the point is as follows:

"Q. And what was your first knowledge that Mr. Gamble, or Mr. Hanifin, on behalf of the complaining union, were in or about your premises?

A. The 26th of September.

Q. That's when they have testified that Mr. Gamble called on you?

A. That's when they called on me in my office.

Q. What transpired at that time?

A. Well, they came into the office and introduced themselves and brought up the subject of a possible contract between me and themselves as representing the men, and words to that effect, and I told them that it was a one-man business

and that being a one-man small business that we had gotten along fine without any union representation, that we were getting along fine, and that I personally was not interested in having a union contract negotiated for.

Q. The conversation was on a friendly tenor?

A. It was on a friendly tenor, yes.

Q. And at that time did one or the other of the gentlemen give you a contract, their form contract for your consideration?

A. Yes, it was a master contract, what they called a master contract, and they give it to me to look over.

Q. Who appeared to be taking the lead in the conversation? Mr. Gamble, or Mr. Hanifin?

A. Mr. Gamble.

Q. Did you say anything to them to the effect that so far as you were concerned there would be no union in your plant?

A. Well, I told them that as far as I was concerned, personally, that I didn't particularly need a union to negotiate with.

Q. Now, after that, they were back again, weren't they?

A. Yes.

Q. And that was along about the third of October?

A. The second or third.

Q. And that conversation took place some place around the office of the plant, out on the sidewalk?

A. Yes.

Q. And you heard Mr. Gamble's testimony? Was that substantially correct?

A. Yes.

Q. You tell us what was said in that conversation.

A. I don't recall word for word what was said. Mr. Gamble or Mr. Hanifin stated that they would like to negotiate, and I told them that I wasn't interested in negotiating, and *then they said, I believe, that in that case we would have to have an election*, and I said—which *was all new to me*; I didn't know what they particularly meant by that, and he explained to me that if they had authorization cards from 30% of the men, that they could file with the NLRB for an election, *that if they won 51% of the votes, that they would then be the bargaining agent for the men*. They were just getting ready to leave, almost in their car, when he explained that to me, and I said, 'Well, go ahead and file for your election.'

Q. Did you ask him——

A. I asked him when he told me—he then told me—I then asked him, 'Well, do you have 30% of the votes, authorization votes in this establishment?' and he said, 'Yes.' And I said, 'Well, may I see the cards, or will you tell me the names of those who authorized you to say that?' And he said, no, he wouldn't. I don't know the exact words he used, but he said no, he wouldn't. That was it. He wouldn't tell me or show me who they were.

Q. Well, on that day, when earlier in the conversation you said to him you didn't need a union or words to that effect, at that time you didn't even ask his verification that he had 30% authorizations, did you?

A. *I didn't have the slightest inkling that he was prepared to negotiate.*

Q. Well, were you aware, or had you been informed by any of your men that either Mr.



Gamble or Hanifin had been in there talking about them?

A. Yes, Cotton had told me once or twice that the union men were active at the plant and I told Cotton that if he saw them again not to give them permission to talk to the men on my time, and I guess he never saw them again to tell them that.

Q. In any event, on October 3rd, or whatever day it may have been, when you made the statement that you didn't need a union, you had no knowledge that they had signed anybody up?

A. Not the slightest." (Tr. pp. 155-158.) (*Italics ours.*)

The conclusion seems inescapable that when the organizers first approached the Employer they had not been authorized by a sufficient number of the employees to make them the bargaining agent in any event. Their efforts at that time were directed to advising the Employer that they "were planning on organizing his employees and starting an organizing drive in this area"; that they "intended to seek representational rights for his employees". (Tr. p. 86.) When they returned on the second occasion, while they may have said they "would like to negotiate", their evident purpose was to determine whether the Employer "would consent to a joint election which was customary between unions and employers for the purpose of recognition of the union as his employees' representative". (Tr. p. 93.) The Employer was asked, "if he would consent to an election if we had over thirty per cent" but he was never allowed to answer the question because he and the organizer became in-

volved over whether or not he should be allowed to see the cards and the Employer finally advised him "to go ahead and have your election". (Tr. pp. 93-94.)

At the risk of being repetitious, we again say: The Employer is a small country businessman. He was acting without legal advice. He did not even know that the claim was being made he was subject to the jurisdiction of the Board. The organizers presumably were experts in their field. They made no demand on him to negotiate on either occasion. Neither has so testified. They had induced the men to sign the authorization cards on the basis of a proposed election. They were talking to the Employer only about an election. They filed a petition for an election which for reasons best known to themselves they later withdrew.

It seems most unjust and unfair and not within the spirit of the Acts on such a tenuous basis, to find that the Employer wilfully refused to negotiate with an alleged bargaining agent when no demand even in ordinary English was made on him in that respect.

How unjust and unfair the result of such a conclusion would be, is demonstrated by the fact that at the present time only two of the original employees are still with the Employer. The wish of the majority, whatever it may be, is apparently not to be consulted if the Board's position is sustained.

And again at the same risk, we say that the Field Examiner himself had serious doubts that the request for recognition was in proper form. (Tr. p. 29.)

Counsel for the Board attempt to distinguish the *Valley Broadcasting* case. We submit the authority is definitely in point on the facts and on the law and should govern here.

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Before concluding, we have noticed an error in our Opening Brief which until now has escaped our attention. The second paragraph on page 10 of our Opening Brief which appears outside the quotes should be in the quote as it is actually part of the Field Examiner's report.

That paragraph begins with the words "Gamble also testified \* \* \*" and ends with the words "\* \* \* on the 16th of the month".

---

### CONCLUSION.

We respectfully submit that the decision of the Board should be directed to comply with the dissenting opinion of the Honorable Mr. Murdock in the event this Court shall determine that the Board had jurisdiction of the controversy.

Dated, Marysville, California,

June 20, 1952.

Respectfully submitted,

RICH, CARLIN & FUIDGE,

*Attorneys for Petitioner,*

*Sam Zall.*



No. 13032

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United States  
Court of Appeals  
For the Ninth Circuit.

---

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,

Appellant,

vs.

PAUL D. MACKIE, and JOSEPH H. LEWIS,  
d/b/a MACKIE & LEWIS,

Appellees.

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Transcript of Record

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Appeal from the United States District Court,  
Western District of Washington,  
Northern Division.

FILED

SEP 24 1951

PAUL P. O'BRIEN, CLERK

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No. 13032

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United States  
Court of Appeals  
For the Ninth Circuit.

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NORTHERN PACIFIC RAILWAY COMPANY,  
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Transcript of Record

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Appeal from the United States District Court,  
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Northern Division.





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

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ROSCOE KRIER,

Attorneys for Appellant,  
909 Smith Tower,  
Seattle 4, Washington.

RUMMENS, GRIFFIN & SHORT,

Attorneys for Appellee,  
1107 American Building,  
Seattle 4, Washington.



United States District Court Western District of  
Washington, Northern Division

No. 2617

PAUL D. MACKIE and JOSEPH H. LEWIS,  
d/b/a Mackie & Lewis,

Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,

Defendant.

### COMPLAINT

Comes now plaintiffs and for cause of action  
against the defendant, complain and allege as fol-  
lows:

#### I.

That plaintiffs, Paul D. Mackie and Joseph H.  
Lewis, at all times herein mentioned have been and  
now are residents of the State of Washington and  
co-partners doing business as Mackie & Lewis with  
their principal office and place of business in Seattle,  
Washington, within the jurisdiction of this court.

#### II.

That the defendant is a corporation duly organ-  
ized and existing under and by virtue of the laws  
of the State of Minnesota, engaged as a common  
carrier in the interstate transportation of freight  
and passengers for hire; that said defendant re-  
ceives property for transportation from points  
within the State of Washington to points in other

States and maintains tracks and facilities within the jurisdiction of this court.

### III.

That this court has jurisdiction of the parties and subject matter of this cause pursuant to part I of the Interstate Commerce Act as amended, 49 USCA, Section 1, et seq.; that defendant, as a common carrier, is subject to the provisions of 49 USCA, 20 (11) of said Act.

### IV.

That on or about the 4th day of March, 1949, plaintiff by and through its agent, Tacoma Plywood Corporation, a corporation, delivered to defendant for shipment from Tacoma, Washington, to Phoenix, Arizona, one carload of Douglas Fir Plywood; that plaintiff thereupon became, and now is, the holder of the Bill of Lading therefor; that defendant accepted and received said property for transportation and did transport the same from Tacoma, Washington, to Phoenix, Arizona; that said shipment arrived in Phoenix, Arizona, on or about the 12th day of March, 1949, with all bracing torn loose and the plywood battered, split, broken and damaged; that the consignee of said shipment, J. D. Halstead of Phoenix, Arizona, refused to accept the same in said damaged condition and plaintiffs were required to and did, in mitigation of damages, cause the said plywood to be unloaded and sold in the open market for the best available price then and there obtaining; that the total net sum so received

for said damaged carload of plywood was the sum of \$3,905.41; that the total net sum plaintiffs would have received from said consignee but for the injury to said goods was the sum of \$5,083.22; that by reason of the foregoing, plaintiffs have suffered damage in the sum of \$1,177.81.

#### V.

That upon the date of arrival of said shipment at Phoenix, Arizona, as hereinabove pleaded, said damaged shipment was then and there thoroughly inspected by defendant's agents; that immediately thereafter and in the month of May, 1949, and again in June, 1949, plaintiff, Paul D. Mackie, discussed the matter of said damage in detail with one of defendant's then claim agents in Seattle, Mr. F. J. Taft; that by reason of said inspection and advice from its agents and from plaintiffs, defendant knew, immediately upon the arrival of said shipment, that it had damaged said shipment and said defendant then had at least as much, if not more, knowledge in relation to said damage than plaintiffs and at all times herein mentioned had or was chargeable with actual knowledge of all the conditions as to said damage.

#### VI.

That on the second day of February, 1950, plaintiffs filed written claim for said damages with defendant in Seattle, Washington; that said claim was by defendant on the 23rd day of February, 1950, and again on the 27th day of February, 1950, denied.

Wherefore, plaintiffs pray that they have judgment against the defendant in the sum of \$1,177.81, together with interest thereon at 6% per annum from and after the 12th day of March, 1949, until paid and for their costs and disbursements taxable herein.

RUMMENS, GRIFFIN & SHORT,  
Attorneys for Plaintiffs.

State of Washington,  
County of King—ss.

Paul D. Mackie, being first duly sworn, on oath deposes and says:

That he is one of the plaintiffs above-named; that he has read the foregoing Complaint, knows the contents thereof and believes the same to be true.

/s/ PAUL D. MACKIE.

Subscribed and sworn to before me this 1st day of September, 1950.

/s/ KENNETH P. SHORT,  
Notary Public in and for the State of Washington,  
residing at Seattle.

[Endorsed]: Filed September 5, 1950.



District Court of the United States for the Western  
District of Washington, Northern Division  
Civil Action File No. 2617

PAUL D. MACKIE and JOSEPH H. LEWIS,  
d/b/a Mackie & Lewis,

Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,

Defendant.

### SUMMONS IN A CIVIL ACTION

To the above-named Defendant: Northern Pacific  
Railway Company, a corporation.

You are hereby summoned and required to serve  
upon Rummens, Griffin & Short, plaintiff's at-  
torneys, whose address is 1107 American Building,  
Seattle, Washington, an answer to the complaint  
which is herewith served upon you within 20 days  
after service of this summons upon you, exclusive  
of the day of service. If you fail to do so, judgment  
by default will be taken against you for the relief  
demanded in the complaint.

Dated: September 5, 1950.

[Seal]                      MILLARD P. THOMAS,  
Clerk of Court.

By /s/ LOIS M. STOLSEN,  
Deputy Clerk.

Return on Service of Writ attached.

Received September 5, 1950.

[Endorsed]: Filed September 7, 1950.

[Title of District Court and Cause.]

### STIPULATION

Whereas the time to answer plaintiffs' complaint will expire on the 26th day of September, 1950;

Now, Therefore, It Is Hereby Stipulated by and between the parties hereto, by and through their respective attorneys of record, that the defendant may have to and including the 9th day of October, 1950, in which to file its answer.

Dated this 26th day of September, 1950.

/s/ KENNETH P. SHORT,  
Of Attorneys for Plaintiffs.

/s/ ROSCOE KRIER,  
Of Attorneys for Defendant.

[Endorsed]: Filed September 26, 1950.

---

[Title of District Court and Cause.]

### ORDER GRANTING ADDITIONAL TIME TO ANSWER

Comes now on for hearing the stipulation of the above-named parties for an extension of time, and it appearing to the court that the time for the defendant to answer will expire on the 26th day of September, 1950, and that the parties have stipulated that the defendants may have to and including the 9th day of October, 1950, in which to file its answer;

Now, Therefore, good cause having been shown and the court being fully advised in the premises;

It Is Hereby Ordered that the defendant may have to and including the 9th day of October, 1950, to file its answer herein.

Done and Dated in Open Court this 26th day of September, 1950.

/s/ JOHN C. BOWEN,  
Judge.

Presented by:

/s/ ROSCOE KRIER,  
Of Attorneys for Defendant.

Approved by:

/s/ KENNETH P. SHORT,  
Of Attorneys for Plaintiff.

[Endorsed]: Filed September 26, 1950.

---

[Title of District Court and Cause.]

### ANSWER

Comes now the defendant and for answer to plaintiffs' complaint admit and denies as follows:

#### I.

The defendant admits the allegations contained in paragraph I of plaintiffs' complaint.

#### II.

The defendant admits the allegations contained

in paragraph II of plaintiffs' complaint, except it denies that it is a corporation organized under the laws of the State of Minnesota.

### III.

The defendant admits the allegations contained in paragraph III of plaintiffs' complaint.

### IV.

The defendant denies the allegations contained in paragraph IV of plaintiffs' complaint, except that it admits that on the 4th day of March, 1949, the Tacoma Plywood Corporation delivered to the defendant for shipment from Tacoma, Washington, to Phoenix, Arizona, one carload of Douglas Fir Plywood, that said shipment was transported from Tacoma, Washington, to Phoenix, Arizona, and that said shipment arrived at Phoenix, Arizona, on or about the 12th day of March, 1949. The defendant denies that the plaintiff has been damaged in the sum of \$1,177.81, or in any sum or amount whatsoever, as in said complaint alleged or otherwise.

### V.

The defendant denies the allegations contained in paragraph V of plaintiffs' complaint except as may be hereinafter admitted.

### VI.

The defendant admits the allegations contained in paragraph VI of plaintiff's complaint.

For a Further and Separate Answer and De-

fense to plaintiffs' complaint, the defendant alleges the following facts:

I.

That during all times herein and in said complaint mentioned, the Northern Pacific Railway Company was a railroad corporation engaged in the business of a common carrier by railroad both interstate and intrastate commerce in the State of Washington and other States, and subject to Part I of the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (United States Code Annotated, Title 49, Chapters 1 and 2) and acts amendatory thereof and supplemental thereto.

II.

That during the times herein and in said complaint mentioned, the Southern Pacific Company was a railroad corporation engaged in the business of a common carrier by railroad in both interstate and intrastate commerce in the States of Oregon, California and Arizona, and other States, and connects with the defendant herein.

That at said times said Southern Pacific Company and the defendant formed a through connecting line of common carrier railroad in interstate commerce between the city of Tacoma in the State of Washington and the city of Phoenix in the State of Arizona.

III.

That on or about the 4th day of March, 1949, the Tacoma Plywood Corporation, as shipper, delivered to the defendant herein one carload of ply-

wood to be transported by it and the said Southern Pacific Company, as connecting carrier, to the city of Phoenix, Arizona, and there delivered to the consignee, one J. D. Halstead.

#### IV.

That said shipment was so delivered to and received by the defendant herein for such transportation under and pursuant to a written contract and agreement then and there made and entered into by and between said shipper and the said defendant, as provided and authorized by law and the lawful tariffs then in effect and applicable to such interstate transportation, and in consideration of the payment by said shipper of the lawful tariff charges therefor.

#### V.

That said bill of lading or contract of carriage provided, among other things:

Sec. 2 (b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claim-

ant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

That the plywood hereinabove described was delivered to the consignee in accordance with the terms of the above-mentioned contract and bill of lading on the 14th day of March, 1949.

## VI.

That the plaintiffs above-named altogether failed and neglected to file their claim in writing in accordance with Section 2(b) of said bill of lading and contract of carriage, as above quoted and set forth, until the 2nd day of February, 1950, at which time more than nine months had expired since the delivery of said plywood.

Wherefore the defendant, having fully answered plaintiffs' complaint, demands that the same be dismissed and that the defendant be allowed to go hence with its costs and disbursements incurred and expended herein.

/s/ DEAN H. EASTMAN,

/s/ ROSCOE KRIER,

Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 9, 1950.

[Title of District Court & Cause.]

## REPLY

Comes now plaintiffs and for Reply to the Affirmative Defense of the defendants, admit, deny and allege as follows:

### I.

As to Paragraphs I and II of said Affirmative Defense, plaintiffs admit the same.

### II.

As to Paragraph III thereof, plaintiffs deny the same except those portions thereof as are pleaded in plaintiffs' Complaint.

### III.

As to Paragraph IV, plaintiffs admit that said shipment was delivered to defendant under and pursuant to a written contract and agreement then and there made and entered into by and between the shipper and defendant, as provided and authorized by law and the lawful tariffs then in effect and applicable to such interstate transportation, and deny each and every other allegation therein contained.

### IV.

As to Paragraph V, plaintiffs admit the first sentence of said Paragraph in its entirety, admit that the plywood therein described was delivered to the consignee on the 14th day of March, 1949, and denies each and every other allegation therein contained.



V.

As to Paragraph VI, plaintiffs admit that they filed a claim in writing on the 2nd day of February, 1950, with the defendant at which time more than nine months had expired since the delivery of said plywood and deny each and every other allegation therein contained.

Wherefore, having fully replied, plaintiffs pray that they have judgment in accordance with the demand of their complaint.

/s/ RUMMENS, GRIFFIN &  
SHORT,  
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed October 13, 1950.

---

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above-entitled action having come on regularly for a pre-trial conference at Seattle, Washington, on the 17th day of May, 1951, before the undersigned Judge of the above-entitled court, and both parties appearing by their respective attorneys of record, and after hearing statements of counsel and being fully advised in the premises, the following pre-trial order was settled:

## Admitted Facts

(1) Plaintiffs, Paul D. Mackie and Joseph H. Lewis, at all times herein mentioned were residents of the State of Washington and co-partners doing business as Mackie & Lewis, with their principal office and place of business in Seattle, Washington.

(2) The defendant, Northern Pacific Railway Company, was at all times herein mentioned a corporation organized and existing under the laws of the State of Wisconsin, and engaged in the business of a common carrier by railroad in both interstate and intrastate commerce in the State of Washington and other States, subject to Part I of the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (United States Code Annotated, Title 49, Chapters 1 and 2) and acts amendatory thereof and supplemental thereto.

(3) The above-entitled court has jurisdiction of the parties and subject matter of this cause pursuant to Part I of the Interstate Commerce Act as amended (49 U.S.C.A., Section 1 et seq.).

(4) The Southern Pacific Company was at all times herein mentioned a railroad corporation engaged in the business of a common carrier by railroad in both interstate and intrastate commerce in the States of Oregon, California and Arizona, and other States, and connects with the defendant herein, and that the said Southern Pacific Company's rails and the defendant's rails formed a through connecting line of common carrier railroad in interstate

commerce between the city of Tacoma in the State of Washington and the city of Phoenix in the State of Arizona.

(5) On or about the 4th day of March, 1949, the Tacoma Plywood Corporation, as shipper, delivered to the defendant herein one carload of plywood to be transported by it and the said Southern Pacific Company, as connecting carrier, to the city of Phoenix, Arizona, and there delivered to the consignee, one J. D. Halstead.

(6) Said shipment was delivered to and received by the defendant herein for transportation under and pursuant to a written contract made and entered into by and between said shipper and the defendant, as provided and authorized by law and the lawful tariffs then in effect and applicable to such interstate transportation.

(7) Said bill of lading or contract of carriage provided, among other things:

“Sec. 2(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from

the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

That the plywood hereinabove described was delivered to the consignee in accordance with the terms of the above-mentioned contract and bill of lading on the 12th day of March, 1949.

(8) Said bill of lading, above described, has been assigned by the said Tacoma Plywood Corporation to the plaintiffs herein, and that the plaintiffs are now the lawful holders thereof.

(9) That on the date of arrival of said shipment at Phoenix, Arizona, an employe of the Southern Pacific Company, one W. G. Howell, inspected the said shipment and made a written report of the results of his inspection to the consignee and said Southern Pacific Company. That said written report provides, among other things,

"Extent of damage not known. Consignee will call for final inspection."

and that neither the consignee nor the plaintiffs herein called for a final inspection, and that no further inspection was made by the agents or employes of the Southern Pacific Company.

(10) That when said shipment arrived at point of destination, the bracing was broken and the load shifted from both ends toward the middle.

(11) That the said consignee, J. D. Halstead, refused to accept said shipment, and the plaintiffs herein, through their agents, disposed of the plywood contained in said shipment to their best advantage, and that said plaintiffs suffered a net loss of \$1,-177.71, including special damages.

(12) The matter of this claim was discussed by the plaintiff, Paul D. Mackie, during the month of May, 1949, and again in the month of June, 1949, with Mr. F. J. Taft, who was at that time the Chief Clerk in the Freight Claim Department of the defendant. During these conversations the said plaintiff advised the said F. J. Taft of his intention to file a claim, and further advised that formal claim was delayed by inability to complete a deal and determine the exact loss.

(13) Plaintiffs above named filed a written claim for their damage with the defendant, in Seattle, Washington, on the 2nd day of February, 1950, at which time more than nine months had expired since the delivery of said shipment of plywood as aforesaid, and that said claim was denied by the defendant on the 23rd day of February, 1950.

#### Plaintiffs' Contentions of Fact

That by reason of the inspection by the Southern Pacific Company and advice from the defendant's agents and from the plaintiffs, the defendant knew

immediately after the arrival of the shipment above described that it had damaged said shipment, and the defendant then had as much, if not more, knowledge in relation to said damage as the plaintiffs, and at all times herein mentioned had or was chargeable with actual knowledge of all the conditions as to said damage.

### Defendant's Contention of Fact

At no time before the plaintiffs filed their claim on February 2, 1950, did the defendant or its connecting carrier know the extent of the damage to plaintiffs' shipment, if any.

### Plaintiffs' Contentions of Law

By reason of the foregoing, Section 2(b) of the bill of lading and contract of carriage has been complied with by the plaintiffs. Under the foregoing circumstances it was not necessary for the plaintiffs to file a formal written claim.

### Defendant's Contentions of Law

(1) The failure of a shipper to file a written claim for damage to his shipment within the time prescribed by the contract is a violation thereof.

(2) A shipper's oral notice to the carrier that he intends to file a claim of loss is not compliance with the terms of the contract.

(3) Under the Interstate Commerce Act the parties may not waive or ignore a valid provision of the contract under which the shipment was made.

### Exhibits

The following exhibits were offered and identified by both parties:

(1) Copy of the bill of lading and contract of carriage under which the herein described shipment moved. It is stipulated between the parties that this copy may be substituted for the original.

(2) Inspection report dated 3/12/49, signed by W. G. Howell, an employe of the Southern Pacific Company, with typewritten copy attached.

(3) A letter dated February 2, 1950, signed Mackie & Lewis by P. D. Mackie, addressed to J. T. Horsley, Freight Claim Agent, Northern Pacific Railway Company. (All the attachments referred to in this letter, except copy of railroad inspectors report (Exhibit 2) refer to damages and are therefore not now material.)

(4) Letter dated February 23, 1950, signed by J. T. Horsley, Western Freight Claim Agent, Northern Pacific Railway Company, addressed to Mackie & Lewis.

(5) Letter dated February 24, 1950, signed by Mackie & Lewis by P. D. Mackie, addressed to J. T. Horsley, W.F.C.A., Northern Pacific Railway Company.

(6) Letter dated February 27, 1950, signed by J. T. Horsley, Western Freight Claim Agent, Northern Pacific Railway Company, addressed to Mackie & Lewis.

## Action by the Court

The foregoing pre-trial order was approved by the parties, as evidenced by the signature of their counsel hereon, and this order is hereby entered as a result of which the pleadings pass out of the case. This pre-trial order shall not be amended except by agreement of the parties or to prevent manifest injustice.

Done in Open Court this 17th day of May, 1951.

/s/ JOHN C. BOWEN,

United States District Judge.

Approved as to form:

RUMMENS, GRIFFIN &  
SHORT,

By /s/ KENNETH P. SHORT,  
Attorneys for Plaintiffs.

/s/ DEAN H. EASTMAN,

/s/ ROSCOE KRIER,  
Attorneys for Defendant.











# **SOUTHERN PACIFIC LINES** **INSPECTION OF DAMAGED FREIGHT**

OS&amp;D #

7340 #

Station Phoenix Date 3/12 1949

ment Received SP Inspector Called \_\_\_\_\_ Date Inspected \_\_\_\_\_

Date	W. B. No.	Car No.	Last Waybilling Point*	Destination	F. B. No.
		65624			

\*See back of this form for definition.

per Tacoma Plywood Consignee J D Halstead

mmodity \_\_\_\_\_ Case No. \_\_\_\_\_ Dely. Order No. \_\_\_\_\_

oice Date \_\_\_\_\_ Discounts \_\_\_\_\_ Drayman \_\_\_\_\_

ute and Other References \_\_\_\_\_

ow Condition of Containers on Delivery \_\_\_\_\_

NOTE: Complete Prior Transportation Reference is Required on Concealed Loss or Damage Claims. See explanation on back of this form. Inspector shall request Consignee to complete and sign back of this form on any damaged articles not packed at "last way billing point."

Where Packed?

## **PRIOR—TRANSPORTATION REFERENCE**

Date	W. B. No.	Car No.	From	To	Complete Route and Junctions
			Car door inspn		

No.	ARTICLES	Invoice	Price	Amount of Claim
	C/L Plywood			
	5 stacks crosswise of car			
	in end separated by bulkheads			
	made of 2" x 6" lbr. All			
	bracing broken & load badly			
	shifted both ends to middle -			
	Extent of dmg not known - C/e			
	will call for final inspn			

Show Disposition of Salvage

SRO #

This report is merely a statement of facts and not an acknowledgment of carrier's liability. Claims for loss and damage must be made in writing to the carrier at point of delivery, or at point of origin, within nine months after delivery of the property, or in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed.

S/ W G Howell

Notice to Claimants:

Inspector

In event claim is made for this damage attach this report thereto. See back of this form for information required in Support of Concealed Loss and Damage Claims" and questions to be answered by claimant.

(Over)



EXHIBIT 3

Mackie & Lewis  
Domestic—Export  
Forest Products  
American Building  
Seattle 4, U.S.A.

February 2, 1950.

J. T. Horsley, Freight Claim Agent,  
Northern Pacific Railway Company,  
Smith Tower,  
Seattle 4, Washington.

Dear Sir:

We wish to file our claim for loss due to damage to plywood shipped in car SP 65624 from Tacoma to Phoenix, Arizona, on March 3, 1949, as follows:

This car was originally billed out to our customer at \$5350.76 as per copy of original invoice attached. This was subject to a 5% commission, so the net amount of the invoice was \$5083.22. The net amount of return on this shipment is \$3905.41 as per statements attached.

You will note in the final settlement of December 12th that we did not allow all of the deductions claimed in H. A. White's letter of May 21st, 1949, and that the net amount on our settlement of December 12th, which in addition to amounts shown in this letter of May 21st also includes \$364.97, which was an agreed settlement of stock left on hand as of that date is \$3031.51. This plus \$873.90 from Cluer totals \$3905.41, or the net amount received from

plywood on this car. This makes a loss on the shipment due to railroad errors of \$1178.81.

This shipment left Tacoma in good condition, well braced, and in proper shape to be shipped. It arrived in Phoenix with all bracing torn loose and with the plywood all battered and mixed in the car. As a result the customers to which it was shipped refused to accept and it was necessary to unload and resell. The above loss was incurred. We claim said amount from you.

Papers attached to prove claim:

Copy of Freight Bill.

Copy of original invoice.

**Copy of letter of May 21st, 1949 (H. A. White).**

**Copy of invoice of Nov. 7th, 1949 (Walter Cluer).**

Copy of final settlement December 12, 1949 (H. A. White).

Four pictures of car and plywood at time of arrival.

Copy of railroad inspectors report at time of arrival.

Please let us have your check to cover.

Yours very truly,

MACKIE & LEWIS,

/s/ P. D. MACKIE.

PDM/tl

Received February 3, 1950.



EXHIBIT 4

Northern Pacific Railway Company  
Freight Claim Office  
1020 Smith Tower  
Seattle 4, Wash.

February 23, 1950.

In Your Reply Please Quote  
Claim 389370 Desk 4  
Mackie & Lewis,  
American Building,  
Seattle 4, Washington.

Attention: Mr. P. D. Mackie

Gentlemen:

I have reference to your claim of February 2, 1950, which you filed with our company for the sum of \$1,178.81 and in connection with alleged damage to plywood from car SP 65624.

The above car arrived Phoenix, Arizona, March 14, 1949, and so delivered to J. D. Halstead. Undoubtedly you are familiar with the fact that contract terms and conditions, uniform bill of lading, Section 2, Paragraph B provide that claims for loss and/or damage must be filed with carrier nine months after date of delivery of shipment in question. It was not until February 3, 1950, that we received your claim here in this office, nearly three months after the nine months' filing period had expired.

I have contacted the Southern Pacific agent at Phoenix with the thought in mind that consignee

might possibly have submitted to the Southern Pacific a notice of intention that a formal claim would be filed at a later date. Unfortunately, such is not the case and I, therefore, have no alternative but to respectfully decline your claim and return all supporting papers.

Yours truly,

/s/ J. T. HORSLEY,

Western Freight Claim Agent.

WJG:jg

Papers attached

#### EXHIBIT 5

Mackie & Lewis  
Domestic—Export  
Forest Products  
American Building  
Seattle 4, U.S.A.

February 24, 1950.

J. T. Horsley, W.F.C.A.,  
Northern Pacific Railway Company,  
1020 Smith Tower,  
Seattle 4, Washington,

Dear Sir:

We cannot accept your refusal to consider our claim, your number 389370, on the technical ground that it was not filed within a time limit.

This claim was discussed both over the phone and in person with Mr. Taft, who was in your department until he was retired late last year. We advised

him of our intention to file such a claim and advised that formal claim was delayed by inability to complete the deal and determine exact loss. At no time in these conversations were we advised of any time limit or of any necessity for making our notice a written one, nor did we read the fine print on the back of the bill of lading.

We believe that this constitutes proper notice and that our claim should be considered on its merits. As a matter of fact, the filing of this claim was made as soon as possible after the actual loss was determined, and the claim should be considered on its merits under any conditions. This is obviously a loss occasioned by railroad failure, and should be compensated.

We are returning the papers attached and ask that you mail us your check to cover.

Yours very truly,

MACKIE & LEWIS,

By /s/ P. D. MACKIE.

PDM/tl

Received February 27, 1950.

## EXHIBIT 6

Northern Pacific Railway Company  
Freight Claim Office  
1020 Smith Tower  
Seattle 4, Wash.

February 27, 1950.

In Your Reply Please Quote  
Claim 389370 Desk 4  
Mackie & Lewis,  
American Building,  
Seattle 4, Washington.

Attention: Mr. P. D. Mackie

Gentlemen:

I have your letter of February 24th regarding the claim involving car SP 65624.

The writer has discussed this matter with Mr. Taft, who does recall talking to you in person about a carload of plywood that arrived destination in a damaged condition. This discussion being some time ago Mr. Taft, of course, could not recall all the details, but regardless of any verbal conversations between yourself and a representative of our company, the terms and conditions of uniform bill of lading (section 2, paragraph B) definitely state that claim must be filed with carrier in writing within nine months after date of delivery. Numerous legal decisions also have consistently held that a verbal notification is not sufficient to stay the statute of limitations.

It is indeed unfortunate that this situation has

come about, as your claim appears to be one of merit, but if we were to waive the statute of limitations in the instant case, we would be subject to penalization by the Interstate Commerce Commission and the participating carriers involved would not accept our debit in the final prorating of claim. In view of the above, I have no alternative but to again respectfully decline your claim and return herewith all papers.

Yours truly,

/s/ J. T. HORSLEY,

Western Freight Claim Agent.

WJG:jg

Papers attached.

[Endorsed]: Filed May 17, 1951.

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[Title of District Court and Cause.]

### ORDER

Judgment will be for the plaintiffs as prayed for. Counsel for plaintiffs will prepare and submit proposed findings of fact, conclusions of law and judgment.

Dated May 23, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed May 23, 1951.

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND  
JUDGMENT

Whereas by previous order made and entered herein the Court directed that judgment will be for the plaintiff and that counsel for the plaintiff will prepare and submit proposed Findings of Fact, Conclusions of Law and Judgment; and

Whereas counsel for the plaintiff has complied with said order and served his proposed Findings of Fact, Conclusions of Law and Judgment upon counsel for defendant;

Therefore, comes now the defendant and objects to the entry of said proposed Findings of Fact and Conclusions of Law and the Judgment based thereon, and particularly objects:

(1) To the entry of paragraph XIV of the proposed Findings of Fact, for the reason that it is not a justified conclusion to be drawn from the stipulated facts.

(2) To the entry of paragraph II of the Conclusions of Law, for the reason that on the basis of the files and records in this cause, the plaintiff is not entitled to judgment against the defendant in the sum of \$1,177.71 or in any amount whatsoever.

(3) To the allowance of interest on the sum of \$1,177.71 from the 12th day of March, 1949, for the reason that this cause is based on an unliquidated claim.

(4) To the entry of judgment in this cause, based on the said proposed Findings of Fact and Conclusions of Law, for the reasons hereinabove stated.

Dated at Seattle, Washington, June 1, 1951.

Respectfully submitted,

/s/ ROSCOE KRIER,

Of Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 1, 1951.

---

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on duly and regularly for trial before the Honorable Dal M. Lemmon, Judge of the United States District Court for the Northern District of California, sitting in the above-entitled court by designation, on the 22nd day of May, 1951, plaintiffs appearing by and through their counsel, Rummens, Griffin & Short and the defendant appearing by and through its counsel, Dean H. Eastman and Roscoe Krier and no testimony having been taken on said hearing but the court having read and considered the Pre-trial Order heretofore entered herein by this court on the 17th day of May, 1951, and having examined and considered the Exhibits attached thereto, and being fully advised in the premises, this court does make the following:

## Findings of Fact

## I.

Plaintiffs, Paul D. Mackie and Joseph H. Lewis, at all times herein mentioned were residents of the State of Washington and co-partners doing business as Mackie & Lewis, with their principal office and place of business in Seattle, Washington.

## II.

The defendant, Northern Pacific Railway Company, was at all times herein mentioned a corporation organized and existing under the laws of the State of Washington, and engaged in the business of a common carrier by railroad in both interstate and intrastate commerce in the State of Washington and other States, subject to Part I of the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (United States Code Annotated, Title 49, Chapters 1 and 2) and acts amendatory thereof and supplemental thereto.

## III.

The above-entitled court has jurisdiction of the parties and subject matter of this cause pursuant to Part I of the Interstate Commerce Act as amended (49 U.S.C.A., Section 1, et seq.).

## IV.

The Southern Pacific Company was at all times herein mentioned a railroad corporation engaged in the business of a common carrier by railroad in both interstate and intrastate commerce in the States



of Oregon, California and Arizona, and other States, and connects with the defendant herein, and that the Southern Pacific Company's rails and the defendant's rails formed a through connecting line of common carrier railroad in interstate commerce between the city of Tacoma in the State of Washington and the city of Phoenix in the State of Arizona.

## V.

On or about the 4th day of March, 1949, the Tacoma Plywood Corporation, as shipper, delivered to the defendant herein one carload of plywood to be transported by it and the Southern Pacific Company, as connecting carrier, to the city of Phoenix, Arizona, and there delivered to the consignee, one J. D. Halstead.

## VI.

Said shipment was delivered to and received by the defendant herein for transportation under and pursuant to a written contract made and entered into by and between said shipper and the defendant, as provided and authorized by law and the lawful tariffs then in effect and applicable to such interstate transportation.

## VII.

Said bill of lading or contract of carriage provided, among other things:

“Sec. 2(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the

loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in the case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

That the plywood hereinabove described was delivered to the consignee in accordance with the terms of the above-mentioned contract and bill of lading on the 12th day of March, 1949.

#### VIII.

Said bill of lading, above described, has been assigned by the said Tacoma Plywood Corporation to the plaintiffs herein, and that the plaintiffs are now the lawful holders thereof.

#### IX.

That on the date of arrival of said shipment at Phoenix, Arizona, an employee of the Southern Pacific Company, one W. G. Howell, inspected the said shipment and made a written report of the

results of his inspection to the consignee and said Southern Pacific Company. That said written report provides, among other things,

“Extent of damage not known. Consignee will call for final inspection.”

and that neither the consignee nor the plaintiffs herein called for a final inspection, and that no further inspection was made by the agents or employees of the Southern Pacific Company.

### X.

That when said shipment arrived at point of destination, the bracing was broken and the load shifted from both ends toward the middle.

### XI.

That the said consignee, J. D. Halstead, refused to accept said shipment, and the plaintiffs herein, through their agents, disposed of the plywood contained in said shipment to their best advantage, and that said plaintiffs suffered a net loss of \$1,177.71, including special damages.

### XII.

The matter of this claim was discussed by the plaintiff, Paul D. Mackie, during the month of May, 1949, and again in the month of June, 1949, with Mr. F. J. Taft, who was at that time the Chief Clerk in the Freight Claim Department of the defendant. During these conversations the said plaintiff advised the said F. J. Taft of his intention to file a claim, and further advised that formal claim was delayed

by inability to complete a deal and determine the exact loss.

### XIII.

Plaintiffs above named filed a written claim for their damage with the defendant, in Seattle, Washington, on the 2nd day of February, 1950, at which time more than nine months had expired since the delivery of said shipment of plywood as aforesaid, and that said claim was denied by the defendant on the 23rd day of February, 1950.

### XIV.

That by reason of the inspection by the Southern Pacific Company and advice from the defendant's agents and from the plaintiffs, the defendant knew immediately after the arrival of the shipment above described that it had damaged said shipment, and the defendant then had as much, if not more, knowledge in relation to said damage as the plaintiffs, and at all times herein mentioned had or was chargeable with actual knowledge of all the conditions as to said damage.

Done in Open Court this ... day of .....,  
1951.

.....,  
Judge.

From the foregoing Findings of Fact the court does deduce the following:

## CONCLUSIONS OF LAW

### I.

That this court is possessed of jurisdiction of the parties and subject matter of this action.

### II.

That plaintiffs are entitled to judgment against the defendant in the sum of Eleven Hundred Seventy-seven and 71/100 Dollars (\$7,177.71) together with their costs and disbursements taxable herein.

Done in Open Court this . . . day of . . . . ., 1951.

/s/ DAL M. LEMMON,  
Judge.

Presented by:

/s/ KENNETH P. SHORT,  
RUMMENS, GRIFFIN &  
SHORT,  
Attorneys for Plaintiffs.

Approved as to form:

DEAN H. EASTMAN, and  
ROSCOE KRIER,

By . . . . .,  
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 1, 1951.

United States District Court, Western District of  
Washington, Northern Division

No. 2617

PAUL D. MACKIE and JOSEPH H. LEWIS  
d/b/a Mackie & Lewis,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,

Defendant.

### JUDGMENT

The above-entitled cause having come on duly and regularly for trial before the Honorable Dal M. Lemmon, Judge of the United States District Court for the Northern District of California, sitting in the above-entitled court by designation on the 22nd day of May, 1951, plaintiffs appearing by and through their counsel, Rummens, Griffin & Short and the defendant appearing by and through its counsel, Dean H. Eastman and Roscoe Krier, and the court having examined and considered the Pre-trial Order heretofore entered herein on the 17th day of May, 1951, together with Exhibits attached thereto, and having heard the arguments of respective counsel and having heretofore rendered, made and entered its findings of fact and conclusions of law, now therefore, in conformity therewith, it is by the court,

Ordered, Adjudged and Decreed that plaintiffs be and they hereby are awarded judgment against the defendant in the sum of Eleven Hundred

Seventy-seven dollars and 71/100 (\$1,177.71) and for their costs and disbursements taxable herein.

Done in Open Court this 1st day of June, 1951.

/s/ DAL M. LEMMON,  
Judge.

Presented by:

/s/ KENNETH P. SHORT.

Approved by:

DEAN H. EASTMAN, and  
ROSCOE KRIER,  
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 1, 1951.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that the Northern Pacific Railway Company, a corporation, the defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on June 1, 1951.

Dated this 21st day of June, 1951.

/s/ DEAN H. EASTMAN,  
/s/ ROSCOE KRIER,

Attorneys for Appellant, Northern Pacific Railway Company.

[Endorsed]: Filed June 21, 1951.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND  
ON APPEAL

Know All Men by These Presents:

That we, the Northern Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, as principal, and the Saint Paul-Mercury Indemnity Company of Saint Paul, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and duly authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Paul D. Mackie and Joseph H. Lewis, d/b/a Mackie & Lewis, the plaintiffs above named, in the just and full sum of Twenty-Six Hundred and No/100ths Dollars (\$2,600.00), for which sum well and truly to be paid we bind ourselves and our respective successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that whereas the above-named plaintiffs on the 1st day of June, 1951, in the above-entitled action and court, recovered judgment against the defendant in the sum of \$1,177.71, together with their costs and disbursements taxable herein, and

Whereas the above-named principal has heretofore given due and proper notice that it appeals from said decision and judgment of said United States District Court.



Now, Therefore, if the principal, Northern Pacific Railway Company, shall pay to Paul D. Mackie and Joseph H. Lewis, d/b/a Mackie & Lewis, the plaintiffs above named, all costs and damages that may be awarded against the said principal on appeal or dismissal thereof, and shall satisfy the judgment appealed from in full, together with costs and interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof we have hereunto subscribed our names and affixed our seals this 21st day of June, 1951.

NORTHERN PACIFIC ..  
RAILWAY COMPANY.

By /s/ DEAN H. EASTMAN,

/s/ ROSCOE KRIER,

Its Attorneys.

SAINT PAUL-MERCURY INDEMNITY COM-  
PANY OF SAINT PAUL

[Seal] By /s/ JAMES P. YOUNG,  
Attorney in Fact.

Approved this 22nd day of June, 1951.

/s/ JOHN C. BOWEN,

District Judge.

Approved 6-21-51.

/s/ KENNETH P. SHORT,

Attorney for Plaintiffs.

[Endorsed]: Filed June 22, 1951.

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[Title of District Court and Cause.]

### STATEMENT OF POINTS

The appellant submits the following points upon which it will rely:

(1) The failure of the shipper to file a written claim for damages to his shipment within the time prescribed by the contract of carriage (bill of lading), is such a violation of the contract as to constitute a waiver of the claim;

(2) A shipper's oral notice to the carrier that he intends to file a claim for damage to his goods in transit is not compliance with the contract, which requires the filing of a claim in writing;

(3) Knowledge of damage to goods in transit on the part of a carrier's agent does not excuse a failure to comply with the provision of the contract requiring filing of claim in writing;

(4) A carrier may not waive or ignore a valid

provision of the contract under which the shipment was made.

Respectfully submitted,

/s/ DEAN H. EASTMAN,

/s/ ROSCOE KRIER,

Attorneys for Defendant  
and Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 11, 1951.

---

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD  
ON APPEAL

It Is Hereby Stipulated by and between the parties herein, by and through their respective attorneys of record, that the record on appeal may include the following:

- (1) Pre-trial Order, together with the six exhibits thereto attached;
- (2) Order announcing the Court's opinion;
- (3) Objections to proposed Findings of Fact and Conclusions of Law;
- (4) Findings of Fact and Conclusions of Law;
- (5) Judgment;
- (6) Notice of Appeal:

## (7) Statement of Points.

Dated this 10th day of July, 1951.

/s/ ROSCOE KRIER,  
Attorney for Defendant  
and Appellant.

/s/ RUMMENS, GRIFFIN and  
SHORT,  
Attorney for Plaintiffs and  
Respondents.

[Endorsed]: Filed July 11, 1951.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11, as Amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said Cause. The papers herewith transmitted constitute the record on appeal from the final judgment filed in said

cause for Plaintiff on June 1, 1951, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Complaint, filed Sept. 5, 1950.
2. Marshal's Return on Summons, filed Sept. 7, 1950.
3. Stipulation extending time to Oct. 9, 1950, to answer, filed Sept. 26, 1950.
4. Order Granting Additional Time to Answer, filed Sept. 26, 1950.
5. Answer, filed Oct. 9, 1950.
6. Reply, filed Oct. 13, 1950.
7. Pre-Trial Order, filed May 17, 1951.
8. Plaintiffs' Trial Memorandum, filed May 18, 1951.
9. Defendant's Trial Brief, filed May 18, 1951.
10. Order ruling judgment for Plaintiffs, filed May 23, 1951.
11. Objections of defendant to Proposed Findings of Fact, Conclusions of Law and Judgment, filed June 1, 1951.
12. Findings of Fact and Conclusions of Law, filed June 1, 1951.
13. Judgment for Plaintiffs, filed June 1, 1951.
14. Notice of Appeal by defendant, filed June 21, 1951.
15. Supersedeas and Cost Bond on Appeal, filed June 22, 1951 (\$2600.00), (Saint Paul-Mercury Indemnity Company of St. Paul).

16. Statement of Points by defendant-appellant, filed July 11, 1951.

17. Stipulation Designating Record on Appeal, filed July 11, 1951.

I certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of defendant, to wit:

Notice of Appeal.....\$5.00,

and that this amount has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 26th day of July, 1951.

[Seal]                      MILLARD P. THOMAS,  
Clerk.

By /s/ TRUMAN EGGER,  
Chief Deputy.

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[Endorsed]: No. 13032. United States Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a corporation, Appellant, vs. Paul D. Mackie, and Joseph H. Lewis, d/b/a Mackie & Lewis, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed July 30, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

United States Court of Appeals  
For the Ninth Circuit

---

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,  
*Appellant,*

vs.

PAUL D. MACKIE, and JOSEPH H. LEWIS,  
d/b/a MACKIE & LEWIS,  
*Appellees.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

**REPLY BRIEF OF APPELLANT**

---

DEAN H. EASTMAN,  
ROSCOE KRIER,  
*Attorneys for Appellant.*

909 Smith Tower,  
Seattle 4, Washington.

---

THE ARGUS PRESS, SEATTLE

FILED

NOV 19 1951

PAUL P. O'BRIEN





United States Court of Appeals  
For the Ninth Circuit

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NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,  
*Appellant,*

vs.

PAUL D. MACKIE, and JOSEPH H. LEWIS,  
d/b/a MACKIE & LEWIS,  
*Appellees.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

**REPLY BRIEF OF APPELLANT**

---

DEAN H. EASTMAN,  
ROSCOE KRIER,  
*Attorneys for Appellant.*

909 Smith Tower,  
Seattle 4, Washington.



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# United States Court of Appeals

For the Ninth Circuit

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NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation, *Appellant*,

vs.

PAUL D. MACKIE, and JOSEPH H. LEWIS,  
d/b/a MACKIE & LEWIS, *Appellees*.

---

No. 13032

APPEAL FROM THE UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

## REPLY BRIEF OF APPELLANT

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By reason of the Interstate Commerce Act, a shipper can deliver his goods to an originating rail carrier for transportation to any destination in the United States or adjacent foreign country. One railroad may handle the entire shipment, but the goods may be carried over five or six railroads before they reach their destination. If to reach their destination the goods have to pass over the rails of five or six railroad companies, the shipper does not have to make a contract with each company; he makes a contract with the originating company only, which fixes the obligation of all the participating carriers. If the goods are damaged in transit, the originating carrier or the delivering carrier may be held responsible to the lawful holder of the bill of lading or anyone entitled to recover thereon for the full actual loss, damage or injury to the property, regardless of which of the five or six railroad companies may have

caused the loss, damage or injury. Title 49, Sec. 20(11), U.S.C.A.

If the shipper wants his property transported from Seattle to Norfolk or from Tacoma to Phoenix, it isn't difficult to see that a good many clerks, station agents and trainmen at widely separated points, working for different companies, are going to participate in the carriage of this property.

The Congress of the United States has amended Sec. 20(11), Title 49, U.S.C.A. several times, as inequities in its application have appeared. In 1915 a provision was inserted declaring any limitation of liability unlawful except as to goods on which a declared value had been stated in writing. In 1930 the statute was amended so as to eliminate the provision for notice and extended the time to be allowed for the filing of claims to nine months. But under each amendment the Congress has retained the provision allowing the carrier to provide in its contract of carriage that a claim in writing must be filed.

The question as to whether or not knowledge of the damage to the goods on the part of the carrier waives the necessity of filing a claim in writing in accordance with the terms of the contract has been before the Supreme Court several times.

In the case of *St. Louis, I. M. & S. R. Co. v. Starbird*, 243 U.S. 592, 61 L.ed. 917, the Supreme Court of the State of Arkansas held that the provision in the bill of lading that the shipper shall give notice to the carrier if he intends to claim damage to his goods was reasonable, but that since the superintendent of the dock,

an agent of the terminating carrier, had knowledge of the damage, the necessity of notice was dispensed with. The court held:

“We find nothing unreasonable in the stipulation concerning notice, and there was no attempt made to comply with it. We therefore think the supreme court of Arkansas erred in holding that verbal notice to the dockmaster of the condition of the peaches was a compliance with the terms of the contract.”

In the case of *Southern Pacific Company v. Stewart*, 248 U.S. 446, 63 L.ed. 350, the owner of the freight failed to comply with the provisions of the bill of lading by giving notice within the time limit. The shipper seeks to avoid the effect of this failure by alleging that the carrier had full knowledge of the injuries sustained by the cattle and that the railroad company had waived its right to notice and recognized the shipper's right to damages by attempting to settle the claim before the time to give the notice had expired. The court then held:

“Considering the principles and conclusions approved by our opinions in *St. Louis, I. M. & S. R. Co. v. Starbird*, 243 U.S. 592, 61 L.ed. 917, 37 Sup. Ct. Rep. 462, and *Erie R. Co. v. Stone*, 244 U.S. 332, 61 L. ed. 1173, 37 Sup. Ct. Rep. 633 (announced since the judgment below), and the cases therein cited, no extended discussion is necessary to show that upon the facts here disclosed the stipulation between the parties as to notice in writing within ten days of any claim for damages was valid. And we also think those opinions make it clear that the circumstances relied upon by the

shipper are inadequate to show a waiver by the carrier of written notice as required by the contract."

In the case of *Baltimore & O. R. Co. v. Leach*, 249 U.S. 217, 63 L.ed. 570, the shipper sought to avoid the effect of his failure to give notice as required by the bill of lading by alleging that he promptly advised the railroad company's agent at destination of all the essential facts, and therefore the requirement of the written notice was waived. The court held:

"The point involved has been discussed in our recent opinions and we can find nothing which takes this case out of the rule requiring compliance with a provision in a bill of lading like the one above quoted."

There are numerous State Court decisions to the effect that if the carrier has knowledge of damage done to goods, the filing of the claim is not necessary. 9 Am. Jur. 920 states:

"Although there is some authority to the contrary, the general rule is that failure to give notice of a claim for damages or loss in accordance with a stipulation in a contract for the shipment of goods is excused, or is inapplicable, where the carrier has or is chargeable with actual knowledge of all the conditions as to damages that a written notice could give."

Every authority cited for this statement is a State Court decision. 13 C.J.S. 487 gives the same rule but qualifies it by stating that it is the view taken by various State Courts but that it is not the federal rule. See 13 C.J.S. 488. Also see Brief of Appellant, page 14.



In the instant case all the facts are stipulated and the entire record is before the court.

The District Court found, in Finding No. IX:

“That on the date of arrival of said shipment at Phoenix, Arizona, an employee of the Southern Pacific Company, one W. G. Howell, inspected the said shipment and made a written report of the results of his inspection to the consignee and said Southern Pacific Company. That said written report provides, among other things,

“‘Extent of damage not known. Consignee will call for final inspection.’

“and that neither the consignee nor the plaintiffs herein called for a final inspection, and that no further inspection was made by the agents or employees of the Southern Pacific Company.”

The court also found, in Finding No. XII:

“The matter of this claim was discussed by the plaintiff, Paul D. Mackie, during the month of May, 1949, and again in the month of June, 1949, with Mr. F. J. Taft, who was at that time the Chief Clerk in the Freight Claim Department of the defendant. During these conversations the said plaintiff advised the said F. J. Taft of his intention to file a claim, and further advised that formal claim was delayed by inability to complete a deal and determine the exact loss.”

From these findings it can be seen that the terminating carrier, Southern Pacific Company, knew there was probable damage to the goods, but there was no inspection after the goods had been unloaded, so that the extent of the damage was not known. The originating carrier, Northern Pacific Railway Company, knew

three months after the delivery of the goods, and six months before the time to file a claim would expire, that Mr. Mackie intended to file a claim, but it did not know for how much.

If in this case the facts were that the property had been totally destroyed, the carrier had not accounted for the salvage, and the damage was caused by the admitted negligence of the carrier, as were the facts in *Hopper Paper Co. v. Baltimore & O. R. Co.*, 178 F.(2d) 179, there might be good reason for the court to say that the carrier had knowledge of the damage to the exclusion of the shipper, and therefore the shipper is excused from complying with the terms of the contract.

The contract made between the shipper and the carrier in this case is one authorized and restricted by statute. It provides that a shipper must file a claim in writing with the originating or terminating carrier. "Such notice puts in permanent form the evidence of intention to claim damages and will serve to call the attention of the carrier to the condition of the freight." *St. Louis, I. M. & S. R. Co. v. Starbird*, 61 L.ed. 917, 925, 243 U.S. 592.

"The transactions of a railroad company are multitudinous, and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to pub-

lie policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations.

“\* \* \* We are not concerned in the present case with any question save as to the applicability of the provision (requiring claim to be filed in writing) and its validity, and as we find it to be both applicable and valid, effect must be given to it.

“\* \* \* Granting that the stipulation is applicable and valid, it does not require documents in a particular form. It is addressed to a practical exigency and it is to be construed in a practical way. The stipulation required that the claim should be made in writing, but a telegram which, in itself, or taken with other telegrams, contained an adequate statement, must be deemed to satisfy this requirement.”

*Georgia, F. & A. R. Co. v. Blish Milling Co.*, 60 L.ed. 948, 241 U.S. 190.

In the instant case the appellee intended to file a claim and did so, but he neglected to file it within the nine months' period. When his claim was first denied on the ground that it was not filed within the nine months' period, he complained in his letter of February 24, 1950 (Ex. 5, R. 30) that in his conversations with Mr. Taft, “who was in your department (Western Freight Claim) until he retired last year,” he told Mr. Taft of his intention to file a claim and advised that formal claim was delayed by inability to complete a deal and determine the exact loss, and that Mr. Taft did not advise him of the time limit or of any necessity of making the notice a written one, and that he did not read the fine print on the back of the bill of lading.

With his letter of February 2, 1950 (Ex. 3, R. 27), Mr. Mackie's claim for damages, he filed a copy of the inspector's report (Ex. 2, R. 25), which report advised him that he must file a claim in writing and within nine months, but he didn't read that either.

The appellee now seeks to avoid his failure to comply with the terms of the contract by alleging that the appellant had as much knowledge of the claim as he had. The Southern Pacific inspector at Phoenix knew that there was probable damage to the shipment on its arrival, and it seems the Southern Pacific inspector was justified in taking the consignee's word that he would call for a final inspection (Ex. 2, R. 25). Also see court's finding No. IX. The Northern Pacific was orally advised that there was damage. Therefore, if the appellant had as much knowledge of the claim as the appellee, it got the information orally.

The appellant respectfully submits that the court erred in refusing to find:

(1) That the failure of the shipper to file a written claim for damage to his shipment within the time prescribed by the contract of carriage (bill of lading) is such a violation of the contract as to constitute a waiver of the claim.

(2) That a shipper's oral notice to the carrier that he intends to file a claim for damage to his goods in transit is not compliance with the contract, which requires the filing of a claim in writing.

(3) That knowledge of damage to goods in transit on the part of a carrier's agent does not excuse a fail-

ure to comply with the provision of the contract requiring filing of claim in writing.

(4) That a carrier may not waive or ignore a valid provision of the contract under which the shipment was made.

Respectfully submitted,

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No. 13034.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

JESSE M. ALLEN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLANT'S OPENING BRIEF.

---

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No. 13034.

IN THE

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*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLANT'S OPENING BRIEF.

---

### Jurisdictional Statement.

This is an appeal in Admiralty from a final decree of dismissal in favor of the Respondent United States of America in the United States District Court for the Southern District of California, Central Division, in a seaman's action for maintenance and cure, a written contractual obligation for wages until the termination of disability and damages for tuberculosis resulting from the unseaworthiness of vessels upon which Libelant was employed.

The pleadings in the District Court were a first amended Libel *in Personam* [Ap. 2]; Answer of the United States of America [Ap. 10]; Respondent's Notice of Motion of Summary Judgment, Points and Authorities in support thereof [Ap. 16].

The Motion for Summary Judgment came before the United States District Court with the Honorable William Mathes, Judge, presiding, on the 26th day of February, 1951. It appeared that the motion did not lie in Admiralty and the question of liability of the Respondent United States of America was submitted to the Court upon a stipulated statement of facts [Rep. Tr. pp. 9, 10, 11, 12, 13 and 14].

Points and authorities were filed by Respondent and Libelant and the matter submitted.

The Honorable Judge then made his order for a decree in favor of Respondent on June 12, 1951 [Ap. 32]. Findings of Fact and Conclusions of Law signed after objections June 22, 1951 [Ap. 35], and a final decree was signed and entered on the 22nd day of June, 1951 [Ap. 39].

The Apostles on Appeal, certified by the Clerk of the District Court, included the following: Petition for Order Allowing Appeal without Prepayment of Costs [Ap. 41]; Order Allowing Appeal without furnishing Bond or Costs [Ap. 42]; Notice of Appeal [Ap. 43]; and Praecipe [Ap. 44].

The jurisdiction of the United States District Court over actions, Civil and Maritime, involving claims for maintenance and cure and damages, arises from Article III, Sections 1 and 2 of the United States Constitution, which provides that the judicial power of the United States shall be vested in the Supreme Court and such inferior courts as Congress may establish, and that such power shall extend to all civil cause of Admiralty and maritime jurisdiction.

Jurisdiction of civil causes of Admiralty and maritime jurisdiction was vested in the courts of the United States by the Act of Congress of September 24, 1789, Chapter 20, Sections 9, 11; Stat. L. 76, 78; 28 U. S. C. A., Section 1333.

Appeals from final decrees in Admiralty are authorized by 28 U. S. C. A., Section 1291; providing that the Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States.

### **Statement of the Case.**

The Libelant, Jesse M. Allen, on May 27, 1944, entered into a written contract of employment with the United States as a seaman, Exhibit 3 in evidence [Rep. Tr. p. 12], among other things this contract provided the following:

“7. The Employee shall be furnished medical and surgical care at the expense of the Government for illness or injury sustained while in line of duty not resulting from the Employee’s own misconduct or delinquency. In the event of illness or injury occasioned by his employment but not due to the Employee’s misconduct, the base wages of the Employee will continue during the period of such incapacity. Any such payments made shall be deemed payments on account of or in full, as the case may be, of any other compensation for sick leave to which the Employee might be entitled on account of such injury or illness. The Government will furnish, or other-

wise provide without cost to the Employee, such medical treatment and hospitalization including subsistence as is necessary for the proper treatment of any such injury suffered or illness contracted while working for the Government; provided, such medical treatment or hospitalization will not be continued if the disability resulting from such injury or illness, in the judgment of a duly appointed medical officer of the United States Army or such other physician as may be designated by the Government, cannot be materially improved by further treatment or hospitalization; and, in this event, the Government may terminate this contract in writing. Upon such termination, the Employee will be returned, at the expense of the Government, to the most convenient port in the United States, to be determined by the Government and at the option of the Employee to the port of his original departure from the United States.

“8. The Employee shall be subject to such benefits as he may be entitled to under the United States Employees' Compensation Act of September 7, 1916, as amended, for injury sustained while in the performance of his duty.”

The Contract of the 27th of May, 1944, was extended by supplementary agreement dated the 14th of March, 1945, Exhibit 4 in evidence.

Libelant incurred tuberculosis during his contract of employment with the United States and said tuberculosis was proximately caused by the conditions of his employment [Resp. Ex. “A,” p. 11]; and has been



totally disabled as the result thereof since October 13, 1947 [Resp. Ex. "A," p. 13, and Resp. Ex. "A," p. 8].

On October 14, 1949, Congress amended the Federal Employees' Compensation Act (Chap. 691, Public Law 357) in Section 303(g) that "The remedy and liability under such act exclusive except as to masters and members of the crew of any vessel, ....."

Libelant had, on some date prior to 1948, applied for compensation as was provided for in his contract of employment [Libelant's Ex. 3, Par. 7] and said claim was denied on July 18, 1949 [Resp. Ex. "A," p. 12].

Respondent failed to pay Libelant his maintenance for the disability sustained in his employment as a seaman, and refused to pay Libelant his wages during his period of disability as provided for in his contract of employment [Libelant's Ex. 3, Par. 7] and in July of 1950, Libelant was forced to accept compensation under the Federal Employees' Compensation Act to supply him with money upon which he could live [Libelant's Ex. 5]. By reason of the failure of Respondents to pay the Libelant his maintenance due him pursuant to general Admiralty law or his base pay as provided for in his contract of employment, Libelant was required to borrow funds through the California State Department of Education and Bureau of Vocational Rehabilitation [Resp. Ex. "A," p. 5].

The District Court found that Libelant had elected to accept compensation and therefore was barred from recovering on the contractual liability of the United States.

### Assignment of Errors.

(a) The District Court erred in finding that the acceptance of compensation under the Federal Employees' Compensation Act barred Libelant from recovering on his contract of employment and other contractual obligations of the Respondent which arose out of his employment.

(b) The District Court erred in not finding that Libelant's contract of employment with the United States provided as follows:

“In the event of illness or injury occasioned by his employment but not due to the Employee's misconduct, the base wages of the Employee will continue during the period of such incapacity.”

(c) The District Court erred in finding that Libelant applied for, received and accepted compensation payments voluntarily, without coercion, duress, misrepresentation or undue influence of any nature whatsoever, and with full knowledge and awareness that he was applying for and receiving from Respondent payments on account of compensation for his illness, under the Compensation Act.

(d) The District Court erred in concluding that Libelant, in accepting compensation provided under Federal Employees' Compensation Act, made his election to accept compensation under said Act.

(e) The District Court erred in concluding that Libelant, by acceptance of compensation under the Federal Employees' Compensation Act, made an election which bars and estops him from recovering from this act the public vessels act.

(f) The District Court erred in concluding that Respondent is entitled to a decree dismissing Libel with costs in Respondent's favor.

(g) The District Court erred in dismissing the First Amended Libel *in Personam*.

(h) The District Court erred in not finding that Libelant had completed all of the terms of his contract of employment and that Respondent is liable for all of the benefits provided for in the written contracts of employment which include Federal Employees' Compensation benefits and base wages in the sum of \$6,996.00 per year from the commencement of the disability resulting from tuberculosis until the same terminated.

(i) The District Court erred in not finding that Libelant was entitled to recover damages proximately resulting from the contractual obligation of the United States to furnish a seaworthy vessel.

### Outline of Argument.

1. This appeal is a trial *de novo*.
2. The provisions of Section 303(g) of the Federal Employees' Compensation Act, Chapter 691—Public Law 357 of the 81st Congress, approved October 14, 1949, is unconstitutional.
3. The District Court erred in finding that the Libelant did elect to accept Compensation in lieu of any other benefits he was entitled by contract.
4. The District Court erred in finding that Libelant accepted Compensation without duress or coercion.
5. The District Court erred in dismissing the libel.
6. The District Court erred in not finding that Libelant was entitled to recover from Respondent on his first and third causes of action.

## ARGUMENT.

### I.

#### **This Appeal Is a Trial De Novo.**

No authority is necessary upon this point in this Circuit.

### II.

**The Provisions of Section 303(g) of Chapter 691—  
Public Law 357 of the 81st Congress, Approved  
October 14, 1949, Are Unconstitutional.**

This Section reads as follows:

“The amendment made by Section 201 of this Act to Section 7 of the Federal Employees’ Compensation Act, making the remedy and liability under such Act exclusive except as to masters or members of the crew of any vessel, shall apply to any case of injury or death occurring prior to the date of enactment of this Act: *Provided, however,* That any person who has commenced a civil suit or an action in admiralty, with respect to such injury or death prior to such date, shall have the right at his election, to continue such action notwithstanding any provision of this Act to the contrary, or to discontinue such action within six months after such date before final judgment and file claim for compensation under the Federal Employees’ Compensation Act, as amended, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after enactment of this Act, whichever is later. If any such action is not discontinued and is decided ad-

versely to the claimant on the ground that the remedy or liability under the Federal Employees' Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after final determination of such cause, whichever is later, be entitled to file a claim under such Act.

"Section 201 of the Act provides that the liability of the United States or any of its instrumentalities under this Act shall be exclusive, . . . : *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel."

Section 305(b) of this Act provides:

"Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel."

Libelant was employed as a seaman pursuant to written contracts with the Army Transportation Service under the dates of May 27, 1944, extended by a contract of April 14, 1945 [Rep. Tr. p. 12].

Among other things the contract of May 27, 1944, provides in paragraph 6, as follows:

"In the event of illness or injury occasioned by his employment but not due to the employee's misconduct, the base wages of the employee will continue during the period of such incapacity."

Paragraph 7 of this same contract further provides as follows:

“The employee shall be subject to the benefits as he may be entitled to under the United States Employees’ Compensation Act of September 7, 1916, as amended, for injury sustained while on the performance of his duty.”

In the Fall of 1947, it was determined that Libelant had contracted tuberculosis of both lungs. He was hospitalized and a claim for compensation under the Act was filed. On July 18, 1949, the claim was rejected. However, upon further consideration, on May 26, 1950, Libelant was awarded compensation for the tuberculosis as such was occasioned by his employment.

During the period that intervened between the Fall of 1947 and May 26, 1949, Congress passed Public Law 357, which included Sections 201, 303(g) and 305(b). The lower Court held that such Act abrogated the vested interests of Libelant in his contract of employment with the United States.

Not only did Congress, if the lower Court was correct in such finding, abrogate the vested interest of Libelant in his employment contract, but also in the *contractual* obligation of the United States to furnish Libelant with a seaworthy vessel upon which he had been employed. Libelant had performed each and every obligation required of him by his contract with the United States. The United States was obligated under the same contract to pay Libelant wages in the amount of his base pay for the duration of his illness, compensation as provided under the F. E. C. A., and contractual damages sustained by

Libelant as the result of the failure of his employer to furnish him with a seaworthy vessel. This latter obligation is contractual and is not founded on negligence.

*The Osceola*, 189 U. S. 158;

*Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372;

*Carlisle Packing Co. v. Sandanger*, 259 U. S. 255;

*Pacific S. S. Co. v. Peterson*, 278 U. S. 130;

*Cortes v. Baltimore Insular Line*, 287 U. S. 367;

*Mahnich v. Southern S. S. Co.*, 321 U. S. 96;

*Seas Shipping Co. v. Sieracki*, 328 U. S. 85;

*Socony Vacuum Oil Co. v. Smith*, 305 U. S. 424;

*The Arizona v. Anelich*, 298 U. S. 110.

In the case of *Seas Shipping Co. v. Sieracki*, *supra*, at 93, the court said regarding unseaworthiness:

“Most often perhaps these have been limitations arising from the erroneous idea that the liability is founded on negligence, and therefore may be defeated by the common-law defenses of contributory negligence, assumption of risk and the fellow servant rule.”  
(Citing cases.)

At page 95, with reference to the duty to supply a seaworthy vessel, the court further stated:

“It is a form of absolute duty owing to all within the range of its humanitarian policy.”

There can be no question that the three causes of action set forth in the First Amended Libel *in Personam*, are contractual [Clk. Tr. p. 2].

The interest of the Libelant in each of these contractual obligations of Respondent was a vested interest, just as much as the interest of Lynch in his War Risk Insurance. *Lynch v. United States*, 292 U. S. 571, 577. The court stated in that case that “. . . War Risk Policies, being contracts, are property and creates vested rights.”

The obligations of the United States to provide Libelant with wages to the termination of his illness, maintenance until the termination of his illness, and damages for the failure to supply him with a seaworthy vessel—if such caused the tuberculosis, were contractual and were vested rights of Libelant accruing prior to October 14, 1949.

Under the circumstances, Congress did not have the power to abrogate these contractual rights.

“To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a Municipality or a citizen.”

*Lynch v. United States, supra;*

*Sinking Fund Cases*, 99 U. S. 700, 719.

The United States is just as liable on its contracts as an individual.

*United States v. Smith*, 94 U. S. 214, 217;

*Priebe & Sons v. United States*, 332 U. S. 407;

*United States v. Standard Rice Co.*, 323 U. S. 106;

*Hollerbach v. United States*, 233 U. S. 165.



The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of contract with it are protected by the Fifth Amendment.

*United States v. Central P. R. Co.*, 118 U. S. 235, 238;

*United States v. Northern P. R. Co.*, 256 U. S. 51;

*Lynch v. United States*, 292 U. S. 571, 579.

Article I, subdivision 10 of the Constitution provides that no state shall pass any law impairing the obligation of contracts. This has been held to also apply to Federal legislation on the grounds of violating the due process clause.

*Louisville Bank v. Radford*, 295 U. S. 555;

*Kuehner v. Irving Trust Co.*, 299 U. S. 445;

*Calder v. Bull*, 3 Dall 386, 388;

*Lynch v. United States*, 292 U. S. 571.

Congress has no power to repudiate its contractual obligations to repay borrowed money.

*Perry v. United States*, 294 U. S. 330.

Nor would it seem under the very same theory and logic that they could repudiate any other contractual obligation to pay money for services performed when the other party to the contract has fully performed.

III.

**The District Court Erred in Finding That the Libelant Did Elect to Accept Compensation in Lieu of Any Other Contractual Benefits to Which He Was Entitled.**

Libelant was entitled, pursuant to his contract of employment with the Respondent, to maintenance and cure, wages until the termination of his disability, damages if his disability resulted from an unseaworthy vessel, and to compensation under the F. E. C. A. at such time as it might be determined that the illness from which he suffered was the result of his employment.

The Respondent did not pay maintenance to the Libelant as was the legal duty, as there was no question but what Libelant fell ill during his employment as a seaman.

By keeping Libelant in an indigent condition, he was forced to accept compensation under the F. E. C. A. [Libelant's Ex. 5].

There is no question but what Libelant was a seaman and was entitled to be paid maintenance by Respondent.

*O'Donnell v. Great Lakes Dredge & Drydock Co.*,  
318 U. S. 36;

*The Osceola*, 189 U. S. 158;

*Aguilar v. Standard Oil Co.*, 318 U. S. 724;

*Cortes v. Baltimore Insular Line*, 287 U. S. 367;

*Farrell v. United States*, 336 U. S. 511;

*Harden v. Gordon*, 2 Mason 541, Fed. Cas. No.  
6047.

The undisputed evidence was that the Libelant

“was without funds with which to live upon and support his wife and was forced thereby to take the funds awarded him under his claim for compensation under the F. E. C. A. for tuberculosis that he suffered as the result of his employment under the contracts of employment with the United States Army Transport Service. That Libelant has been unable to work since he was taken to the hospital suffering from what later was discovered to be Tuberculosis, in the fall of 1947.” [Libelant’s Ex. 5.]

In the face of this evidence, there is no foundation in fact for the finding of the Court that Libelant voluntarily, without coercion, duress, or influence whatsoever, accepted compensation payments.

Coercion sufficient to avoid a contract need not, of course, consist of physical force or threat of it. Social or economic pressure illegally or immorally applied may be sufficient.

*Hartsville Oil Mill v. United States*, 271 U. S. 43;  
*Hazlehurst Oil Mill Co. v. United States*, 70 Ct. Cl. 335;

*Stuck Const. Co. v. United States*, 96 Ct. Cl. 186.

It is held that duress is a condition of mind resulting from such improper pressure that the will is overcome and an involuntary act or contract is induced; a condition of mind produced by an unlawful intimidation, and resulting in the doing of an act which is not required by law.

*O’Toole v. Lamson*, 41 App. D. C. 276.

Economic duress is recognized as the basis for invalidating contracts.

*Snyder v. Rosenbaum*, 215 U. S. 261.

Nor can one retain the gain obtained by the exercise of duress.

*Kelble Operating Corp. v. Jarka Corp.*, 96 F. 2d 601.

The obligation of the United States to pay the Libelant maintenance was an obligation annexed to his contract of employment as a seaman.

*Aguilar v. Standard Oil Co.*, 318 U. S. 724;

*Cortes v. Baltimore Insular Line*, 287 U. S. 367;

*The Osceola*, 189 U. S. 158;

*Harden v. Gordon*, Fed. Cas. No. 6047.

By refusing to pay Libelant his maintenance as was required by law, Respondent actually forced Libelant to accept compensation. This was duress and coercion at their best. Not only is the record absolutely bare of any evidence to support the finding that Libelant freely and voluntarily accepted compensation without coercion or duress, but such finding is in direct conflict with the undisputed evidence [Libelant's Ex. 5].

#### IV.

#### The District Court Erred in Dismissing the Libel.

In view of the undisputed coercion and duress in obtaining the payment to Libelant of compensation; in view of the fact that Congress was without power to enact legislation abrogating the contractual obligations of the United States to the Libelant; and in view of the fact that Sections 201 and 305(b) of the F. E. C. A. exclude seamen from the exclusive liability of the United States under the F. E. C. A., the libel should not have been dismissed.

V.

**The District Court Erred in Not Finding That Libelant  
Was Entitled to Recover From Respondent on  
His First and Third Causes of Action.**

In view of the foregoing, it is clear that the lower Court should have found in favor of Libelant on his first and third causes of action. The second cause of action is for maintenance, but the payment of compensation is the same as the payment of maintenance and a recovery of maintenance and the collection of compensation would amount to a double recovery.

**Conclusion.**

It is respectfully submitted that Congress was without power to abrogate the obligations of the Contract of the Army Transport Service with Libelant and to abrogate the contractual obligation to furnish Libelant with a seaworthy vessel; and that the Decree of Dismissal be reversed with instructions to find in favor of Libelant for wages and to determine the liability of Respondent for unseaworthiness of vessels upon which Libelant was required to work.

Respectfully submitted,

FALL AND HAYTON,

By DAVID A. FALL,

*Proctors for Appellant.*



No. 13034

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**JESSE M. ALLEN, LIBELANT-APPELLANT,**

*v.*

**UNITED STATES OF AMERICA**

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION**

---

**BRIEF FOR THE UNITED STATES AND APPENDIX**

---

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**FILED**

UCL 4 1951

**PAUL P. O'BRIEN**  
CLERK





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# In the United States Court of Appeals for the Ninth Circuit

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No. 13034

JESSE M. ALLEN, LIBELANT-APPELLANT,

v.

UNITED STATES OF AMERICA

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

---

## BRIEF FOR THE UNITED STATES

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### JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. 1291 by reason of a notice of appeal, filed July 2, 1951 (R. 43), from a decree in favor of the United States, entered on June 22, 1951 (R. 39).<sup>1</sup>

The jurisdiction of the District Court purports to be invoked under the Public Vessels Act, 1925 (46 U.S.C. 781-789), by (1) an original libel, filed October 14, 1949, in two counts (SR. 1-6), the *first*, for damages by unseaworthiness on voyages aboard public vessels of the Army Department, beginning July 5, 1945 and ending July 8, 1947, the *second*, for maintenance from and after October 25, 1947, and (2) an amended libel, filed

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<sup>1</sup> For the convenience of the Court we have printed in the Appendix to this brief the most important parts of the record. Throughout this brief the abbreviations R, for apostles or record; SR, for supplemental apostles or record, and Appx., for the Appendix, are employed. The figures following refer to the respective pages.

November 8, 1949, in three counts (R. 2-9, Appx. 1a-6a), which added to the foregoing a *third*, for breach, on October 9, 1947, of a written contract of employment.

### QUESTIONS

Libelant, a civil service employee of the United States, contracted tuberculosis during his service on certain vessels of the Army Transport Service. His last voyage ended July 8, 1947, he returned to the continental United States, and the Government thereafter terminated his employment on October 9, 1947. He filed timely claim for compensation under the Federal Employees' Compensation Act and later, on October 14, 1949, brought suit under the Public Vessels and Suits in Admiralty Acts for damages by unseaworthiness, for maintenance and for breach of his special written contract of employment. Subsequently, an award of compensation was made to him which he elected to receive in place of all other benefits and he is currently collecting checks therefor. The questions are—

1. Whether libelant's suit is barred by the expiration of the two year statute of limitations of the Public Vessels and Suits in Admiralty Acts.

2. Whether, in the absence of an explicit statutory direction for double recovery or election, the injury, illness or death in the performance of duty of civil, unlike military service employees of the United States, gives rise to a right of action against the Government, or whether their sole recovery is the benefits of the compensation, leave, and retirement statutes applicable to personnel of their type.

3. Whether under the special written employment contract in this case appellant was entitled to payment of full wages after termination of the voyage until his complete recovery.

4. Whether appellant's irrevocable election, pursuant to the Act of July 1, 1944, of benefits under the

Federal Employees Compensation Act, rather than any payments or benefits otherwise available because of his service as a government employee, is binding or may be set aside on the ground of economic coercion.

#### STATUTES

1. The Federal Employees' Compensation Act, 1916, c. 458, 39 Stat. 742, as originally enacted and as in effect at all times here involved provided in pertinent part:

[Sec. 1.] That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty \* \* \*

Sec. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States.

2. The Act of July 1, 1944, c. 373, 58 Stat. 712, amending Section 7 of the original Compensation Act so as to require election between compensation benefits and any payments or benefits otherwise available because of service as a government employee, at all times here involved, provided:

Sec. 605. (a) Section 7 of the Act of September 7, 1916, entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", as amended (U.S.C., 1940 edition, title 5, sec. 757), is amended by changing the period at the end thereof to a colon and adding

the following: "*Provided*, That whenever any person is entitled to receive any benefits under this Act by reason of his injury, or by reason of the death of an employee, as defined in section 40, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the Commission may for good cause allow, and when made shall be irrevocable unless otherwise provided by law."

#### STATEMENT

Appellant was a civil service employee of the Army serving in the engine department of various Army Transport vessels in various capacities up to the final rating of Chief Engineer. He was employed first under a renewable one-year written employment contract. Later he signed a permanent agreement of enrollment as a civil service employee of the Army Transport Service. His prior original contract was not renewed. He developed tuberculosis in the service of his vessels. On July 8, 1947, he was discharged from his last voyage. Thereafter he was returned to the continental United States and on October 9, 1947, he was terminated and his pay stopped. On July 26, 1948, he filed claim for compensation under the Federal Employees' Compensation Act. On October 14, 1949, he brought his original libel in two counts, (1) for damages by unseaworthiness, and (2) for maintenance money. On November 8, 1949, he filed an amended libel adding an entirely new count (3) for damages for breach of an alleged written contract to pay him full wages after discharge until his complete recovery.

On May 26, 1950, an award of compensation at the rate of \$89.71 per week was made appellant by the Compensation Bureau. In view of his pending suit the award was conditioned, as required by the Act of July 1, 1944, c. 373, 58 Stat. 712, upon appellant's election to accept the benefits so awarded in place of the wage payments and other benefits he was claiming in his pending suit. On July 21, 1950, he executed the required election. Thereafter, on August 4, 1950, an initial check for \$6,486.87 accrued compensation was issued to him and up until the present checks for \$391.12 have continued to issue to him each four weeks. Appellant has continued to cash all such compensation checks as received but did not voluntarily dismiss his libel in accordance with his election. When the court below dismissed his libel, on the ground that his election bared the present action, appellant took this appeal.

In the amended libel (R. 2-9, Appx. 1a-6a) the first count alleged appellant's service on the allegedly unseaworthy vessels to have been during the period from July 5, 1945 to July 8, 1947 (Art. 3, R. 3, Appx. 1a) and the diagnosis of tuberculosis as being made on October 25, 1947 (Art. 6, R. 4, Appx. 2a). The second count, however, alleged appellant to have been under medical treatment ever since August 1947 (Art. 17, R. 6, Appx. 4a). In the second count maintenance money was claimed from January 19, 1948 (Art. 15, R. 6, Appx. 3a). The third count alleged that the United States terminated wage payments to appellant on October 9, 1947 (Art. 21, R. 8, Appx. 5a) but despite the allegation that appellant has been under medical treatment since August 1947 (Art. 17, R. 6, Appx. 4a) asked wages only from October 25, 1947 (Arts. 21-22, R. 8, Appx. 5a).

The United States filed an answer (R. 10-15) and moved for summary judgment (R. 16). As the local admiralty rules made no provision for summary judg-

ment the district court heard the case on the pleadings, admissions and documentary evidence and filed an "Order for Decree" stating as his reason for the dismissal that libelant's acceptance of compensation barred recovery (R. 32, Appx. 7a). The district court also made findings and conclusions (R. 35-38, Appx. 8a-10a) and entered a decree dismissing the amended libel (R. 39).

The findings may be quickly summarized. Appellant had two contracts with the United States: the first entered into on May 27, 1944 was for one year, "thereafter, on March 14, 1945, a new contract was entered into between libelant [appellant] and the United States of America by and through [the] Army Transport Service for [the] duration of the war plus six months" (Fndg. I, R. 35, Appx. 8a). Appellant first served on a voyage on the FS 292, beginning at Los Angeles on July 5, 1945 and ending at Guam on May 26, 1946; next on a voyage on the FS 411, beginning at Guam on May 26, 1946, and ending on July 8, 1947. In the course of this service he was successively promoted so that when the last voyage ended he was Chief Engineer (Fndg. III, R. 36, Appx. 9a). Prior to the institution of this suit, appellant had filed claim under the Federal Employees' Compensation Act for compensation on account of having become ill with tuberculosis during the course of his employment with the United States (Fndg. IV, R. 36, Appx. 9a). Subsequent to filing this suit, appellant accepted payment of compensation under an award by the Compensation Bureau (Fndg. V, R. 36-37, Appx. 9a). This acceptance of compensation was voluntary "without coercion, duress, misrepresentation or undue influence of any nature whatsoever, and with full knowledge and awareness that he was applying for and receiving from respondent [United States] payments on account of compensation for his illness, under the compensation act" (Fndg. VI, R. 37, Appx. 9a).



The court's findings may be supplemented from the documents in evidence. As the court below found, appellant had two distinct employment contracts, the second a new contract entirely superseding the other. The first was dated May 27, 1944, and entitled "Employment Contract" (Libelant's Exhibit 3, Appx. 11a-15a). It provided that appellant would serve for one year (Article 1) subject to extension "upon agreement of both parties in writing" (Article 17, Appx. 14a). There is no document in writing extending the 1944 one-year contract, but instead on March 14, 1945, the parties entered into a new superseding agreement. This was a so-called permanent enrollment agreement providing for employment for the duration of the war plus six months unless sooner relieved on entirely different terms from the 1944 one-year contract (Libelant's Exhibit 4, Appx. 15a-18a). It provided:

I understand that this constitutes an agreement of enrollment supplemental to my appointment as an employee of the Government under Civil Service Rules, Schedule A-IV-3 thereof, and that I am entitled to pertinent Civil Service rights, privileges and benefits thereunder, including special benefits applicable to marine employees of the War Department as may be pertinent thereto in accord with law and regulations.

\* \* \* \* \*

I agree \* \* \* if the Government should exercise its right to relieve me prior to the conclusion of this term of enrollment for whatever reason, I may be disenrolled and my employment terminated at the pleasure of the Government and under such circumstances I shall have no further right or claim against the Government whatsoever, except as may be provided by law or regulations now or hereafter to be established.

Under date of May 26, 1950, an award of compensation was made libelant at the rate of \$89.71 per week for

the future plus several thousand dollars of accrued compensation. In accordance with the provisions of the Act of July 1, 1944, c. 373, 58 Stat. 712, requiring election by claimants entitled to other payments the award (Respondent's Exhibit A, Appx. 19a-20a) provided:

That claimant above named, having previously filed a libel in admiralty in the United States District Court, Southern District of California, Central Division, against the United States of America, shall be required to elect whether he intends to pursue his libel filed in the United States District Court or to receive benefits under the Federal Employees' Compensation Act.

\* \* \* \* \*

That before compensation is paid under this award the claimant shall be required to execute and return the attached election to receive benefits under the Federal Employees' Compensation Act in place of any benefits under any other Act of Congress, including the Public Vessels Act, Suits in Admiralty Act and the Federal Tort Claims Act.

Thereafter, on July 21, 1950, appellant executed the required election agreeing as follows (Respondent's Exhibit A, Appx. 23a):

I, *Jesse M. Allen*, injured in the performance of duty while employed by *Department of the Army, San Francisco Port of Embarkation, Fort Mason, California*, at *A.P.O. 264 and A.P.O. 455*, on *prior to Aug. 14, 1947*, having filed a claim pursuant to the provisions of the Federal Employees' Compensation Act, as amended (5 U.S.C. 751), on account of such injury elect, in accordance with Section 7 of said Act to receive benefits if available under said Act, in place of any benefits (other than the proceeds of any insurance policy) under any other Act of Congress, including the Public Vessels Act, Suits in Admiralty Act, and the Federal Tort Claims Act.

Appellant has not, however, dismissed his libel as agreed, but while collecting under the award has continued his litigation on the ground that his election and acceptance of compensation was under "economic duress and coercion" (cf. Appellant's Br. 14-16). In support of his claim of coercion appellant's only evidence was his own affidavit stating as follows (Libelant's Exhibit 5, Appx. 27a):

Jesse M. Allen, being first duly sworn, deposes and says: That he is the libelant in the above entitled action. That he was without funds with which to live upon and support his wife and was forced thereby to take the funds awarded to him under his claim for compensation under the F.E.C.A. for Tuberculosis that he suffered as the result of his employment under the contracts of employment with the United States Army Transport Service. That libelant has been unable to work since he was taken to the hospital suffering from what later was discovered to be Tuberculosis, in the Fall of 1947.

The court below rejected appellant's contention that he might repudiate the irrevocable election required by the Act of July 1, 1944, c. 373, 58 Stat. 712, as a condition precedent to payment. The court found (R. 36-37, Appx. 9a-10a):

V. That following the execution and filing of said claim for compensation under the Federal Employees' Compensation Act, as aforesaid, libelant received and accepted compensation payments for said illness from the United States Employees' Compensation Commission subsequent to the institution of suit.

VI. That libelant applied for, received and accepted compensation payments voluntarily, without coercion, duress, misrepresentation or undue influence of any nature whatsoever, and with full knowledge and awareness that he was applying for and receiving from respondent [United States]

payments on account of compensation for his illness, under the Compensation Act.

The court accordingly entered its decree dismissing appellant's amended libel and this appeal followed.<sup>2</sup>

#### SUMMARY OF ARGUMENT

I. Appellant's first and third claims, for damages by unseaworthiness and for breach of an alleged special contract to pay him full wages until complete recovery, are time barred because not brought within the two-year jurisdictional limitation of the Public Vessels and Suits in Admiralty Acts. His claim for unseaworthiness accrued on July 8, 1947, when his service on the vessels ended and he was discharged. Limitations had thus expired before he brought suit on October 14, 1949. His claim for wages was accrued on October 9, 1947, when the Government terminated him and stopped all payment of wages. Limitations had therefore expired long before he first brought suit for this new claim in his amended libel filed November 8, 1949. But even if this new claim were to relate back to the filing of the original libel on October 14, 1949, which we deny, still it was more than two years after his termination on October 9, 1947. It was, therefore, equally time barred. Appellant's second claim, for maintenance, is good as to any accruing within two years of the filing of the libel, but in this court he appears to abandon it on the ground that he has already collected compensation (Appellant's Br. 17).

---

<sup>2</sup> The court below appears to have agreed with other courts which have passed upon the point that the 1949 amendments did not modify the rights of the civilian component of the crew of armed forces vessels. Nowhere, either in the order for decree or in the findings and conclusions is there the slightest foundation for appellant's assertion (Br. 10) that "The lower court held that such act [of 1949] abrogated the vested interests of libelant in his contract of employment with the United States."

II. Appellant's right to receive compensation precludes his recovery on both his first and second claims, for unseaworthiness and for maintenance money. It is the settled law of four circuits, *Mandel v. United States*, (3d Cir., August 16, 1951); *Johansen v. United States*, (2d Cir., July 30, 1951); *Lewis v. United States*, (D.C. Cir., 1951) 190 F. 2d 22; and *Posey v. Tennessee Valley Authority*, (5th Cir., 1937) 93 F. 2d 726, that the rights of government personnel under the particular compensation, leave and retirement statutes applicable to employees of their class are exclusive and preclude the existence of any cause of action against the United States for injury, illness or death. The necessity for this rule where members of the civil service component of the crew of Army Transport vessels are concerned is obvious from a consideration of the nature of such operations.

The attack transports, hospital ships and tugs involved in these cases are auxiliaries of the fleet employed in the very presence of the enemy. Their crews, civil and military service components alike, are equally subject to military law. Since the military service component is confined to their rights under the military compensation, leave and retirement acts, justice requires a similar limitation when the civil service component is involved. This is particularly so since the civil service benefits are more generous. It also accords with the decisions of the Comptroller General, and later of Congress in the War Shipping Administration (Clarification) Act, which exclude government employed merchant seamen from the benefits of compensation and make exclusive their recovery by suit. For the details of our argument on this point we refer to the Government's brief in No. 12906, *Vatuone v. United States*.

III. Appellant has no right to wages after his termi-

nation on October 9, 1947. As a seaman, under the general law maritime he had no right to wages after his discharge at the conclusion of his last voyage on July 8, 1947. As a government employee, he had no right to wages after his termination, on October 9, 1947, following his return to the continental United States. His 1945 permanent agreement of enrollment as a civilian marine employee of the Army Transportation Corps provided that the Government, in its discretion, could relieve him of duty at any time, in which event he would be entitled to wages only until his return to the United States. His 1945 permanent enrollment agreement was alone in force at the time of his termination. His original 1944 renewable one-year employment contract had not been renewed and had been superseded by his permanent enrollment agreement of March 14, 1945. This was, of course, long before the beginning, on July 5, 1945, of his first voyage involved in the present litigation. But, even if appellant's 1944 one-year contract was still in some way effective, still that agreement equally allowed full wages during sickness *but only within the one-year contract period, or any written renewal thereof.*

IV. Appellant's election to accept compensation, in place of his disputed claim for full wages until recovery, requires dismissal of his claim for wages. Neither the 1944 nor the 1949 amendments to the original 1916 Federal Employees' Compensation Act altered appellant's rights. Section 7 of the original 1916 Act expressly prohibited the payment of unearned wages for any period for which compensation was paid. Appellant's receipt of compensation thus required dismissal of his claim for wages aside from any amendments after 1916. The 1944 amendment merely added the procedural requirement that before receiving payments of compensation the claimant should file a formal election. It made no change in the substantive

effect of the original statutory prohibition of 1916. The 1949 amendment was merely declaratory of the pre-existing exclusiveness and in any event does not by its terms apply to seamen, such as appellant here. Upon electing, appellant collected accrued compensation of \$6,486.87. Since that time he has continued to collect \$391.12 each four weeks. Appellant has not offered to return the money, and it is not disputed that appellant acted with full knowledge of the legal prohibition against collecting both compensation and wages. Despite the avuncular indulgence which seamen, including masters and officers, enjoy as members of a privileged class who are wards of the admiralty judges, we submit that Chief Engineer Allen should none the less be bound by the plain Congressional command just as are more humble citizens.

## ARGUMENT

### I

**Appellant's claims for damages by unseaworthiness and by breach of his special employment contract are barred by the two-year jurisdictional limitation of the Public Vessels and Suits in Admiralty Acts.**

At the outset appellant's first and third claims, for unseaworthiness and wages, are met by the bar of the two-year jurisdictional statute of limitations of the Suits in Admiralty Act (46 U.S.C. 745), made equally applicable under the Public Vessels Act by reason of 46 U.S.C. 781. *Phalen v. United States*, (2d Cir., 1929) 32 F. 2d 687; *Sgambati v. United States*, (S.D. N.Y., 1947) 75 F. Supp. 18, aff'd 172 F. 2d 297, cert. den. 337 U.S. 930. As for appellant's second claim, for maintenance money, jurisdiction exists for any maintenance which accrued within two years before October 14, 1949, the filing date for appellant's original libel claiming maintenance. But in this Court appellant abandons any

claim for maintenance<sup>3</sup> while his claims for damages by unseaworthiness and for breach of his employment contract are clearly time barred.

Appellant's first claim, for damages by unseaworthiness, accrued not later than July 8, 1947, the date on which his last voyage terminated (Am. Lib. Art. 4, R. 3, Appx. 2a; Fndg. III, R. 36, Appx. 9a). This was more than two years prior to the filing of the libel on October 14, 1949. Furthermore, appellant's medical treatment admittedly was during August 1947 (Am. Lib. Art. 17, R. 6, Appx. 4a, cf. 24a-27a), which likewise was more than two years before. It cannot help the appellant to allege that a further final diagnosis was made on October 25, 1947, which confirmed that his disease was tuberculosis. (Am. Lib. Art. 7, R. 4, Appx. 2a). Under settled decisions as well as plain logic the cause of action for injury by diseases such as tuberculosis and silicosis accrues the last day on which the claimant was exposed to the conditions causing his injury, not when a precise

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<sup>3</sup> Appellant's brief (p. 17) states: "The second cause of action is for maintenance, but the payment of compensation is the same as the payment of maintenance and a recovery of maintenance and the collection of compensation would amount to double recovery." Of course compensation is not in any sense the same as maintenance. Compensation is a very great deal more. Compensation, like maintenance is paid for injury or illness while in the service of the ship regardless of fault or negligence. Unlike maintenance, compensation is payable even though the seaman is hospitalized and receiving full maintenance in kind. Compensation is only limited by a statutory maximum of \$525 per month (5 U.S.C. 756(c)) and not, like maintenance, to the reasonable value of the seaman's quarters and subsistence. Since August 1948 the usual rate on maintenance has risen to a maximum of \$6.00 per day or \$42.00 per week as compared with appellant's weekly compensation in this case of \$89.71. Before August 1948, maintenance was still lower, usually only \$4.50 per day.



diagnosis was subsequently made.<sup>4</sup> Here that date was July 8, 1947, the day he left the vessel.

Appellant's third claim for the alleged breach of his special employment contract equally, accrued more than two years before he brought suit for the breach, whether this be regarded as dating from its first inclusion in the amended libel of November 8, 1949 or from the original libel of October 14, 1949.<sup>5</sup> The breach, if there was one, clearly occurred and appellant's third cause of action arose on October 9, 1947, when he was terminated (Am. Lib. Art. 21, R. 8, Appx. 21a). There is no question but that appellant's third claim accrued on October 9, 1944, when the United States finally terminated appellant under its interpretation of the contract and

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<sup>4</sup> *Sadowski v. Long Island RR Co.*, (1944) 292 N.Y. 448, 55 N.E. 2d 497, 501; *Michalek v. U. S. Gypsum Co.*, (2d Cir., 1935) 76 F. 2d 115, rev'd on other grounds 298 U.S. 639; *Hercules Powder Co. v. Bannister*, (6th Cir., 1948) 171 F. 2d 262; *Berry v. Franklin Plate Glass Co.*, (W. D. Pa., 1946) 66 F. Supp. 863, 869, aff'd (3d Cir., 1947) 161 F. 2d 184, cert. den. 332 U.S. 767, following *Plazak v. Allegheny Steel Co.*, (1936) 324 Pa. 422, 188 Atl. 130, 133; *Schmidt v. Merchants Despatch Co.*, (1936) 270 N.Y. 287, 200 N.E. 824, 827; See also *Henson v. Dept. of Labor*, (1942) 15 Wash. 2d 384, 130 P. 2d 885, 888.

<sup>5</sup> Appellant's third claim, for breach of contract, was first asserted on November 8, 1949, when he filed his amended libel adding for the first time his new cause of action for breach of an alleged special contract to pay him wages until complete recovery. This was clearly a new claim entirely independent of his original two claims for damages by unseaworthiness and for maintenance. It thus did not relate back to the filing of the original libel. An amendment has been regarded as dating back to the filing of the original suit only where it, as was said in *Seaboard Air Line Ry. v. Renn*, (1916) 241 U.S. 290, 293, "merely expanded or amplified what was alleged in support of the cause of action already asserted \* \* \* But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested."

not at any later date. Never thereafter did the United States at any time offer to pay him wages or reinstate him in accordance with his own interpretation of his contract. Appellant cannot assert his claim accrued at any later date. It is elementary that when a contract is breached the wrongdoer either desires the other party to continue performance or to stop. The innocent party may, if the wrongdoer accepts, continue his performance. But not where, as here, nothing remains to be done except to pay, here the repudiation is absolute. The Government's act in terminating appellant according to its own reading of the contract was not an inconsequential trifle having no general significance or pecuniary importance. If appellant's construction of the contract is correct, which we deny, it reached to the very heart of appellant's contract. Limitations thus began running from October 9, 1947, the date of the alleged breach, if breach it was. *Shatte v. International Alliance*, (9th Cir., 1950) 182 F. 2d 158, 164, rehearing denied 183 F. 2d 685, cert. den. 340 U.S. 827, and cases there cited, especially *Baron v. Kurn*, (1942) 349 Mo. 1202, 164 S.W. 2d 310, 316 and *Taylor v. Tulsa Tribune Co.*, (10th Cir., 1943) 136 F. 2d 981, 983.

The apparent omission of the Government's attorneys to insist on the bar of the statute in the court below cannot work a waiver of the rights of the United States. The bar of the statute is jurisdictional and the Government's attorneys may not waive it nor neglect it. *Munro v. United States*, (1937) 303 U.S. 36, 41; *Wallace v. United States*, (2d Cir., 1944) 142 F. 2d 240, 242. The courts must on their own motion satisfy themselves that limitations have not run and their jurisdiction expired. *Kendall v. United States*, (1882) 107 U.S. 123, 125. "Jurisdiction is not a matter of sympathy or favor. The courts are bound to take notice of the limits of their authority." *Reid v. United States*, (1908) 211 U.S. 529, 539. It has been re-

peatedly declared that "The right of the plaintiff to recover is a purely statutory right" and jurisdiction, as the Supreme Court said, "cannot be enlarged by implications." *Price v. United States*, (1899) 174 U.S. 373, 375. "It matters not what may seem to this court equitable or what obligation we may deem ought to be assumed," the Court continued, "we cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume."

Indeed, as was said in *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686, "The sovereignty of the United States raises a presumption against its suability unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language requires." So, in another case where a claimant, like appellant here, had slept while his rights became time barred, the Court said, "suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued." *United States v. Michel*, (1931) 282 U.S. 656, 659. And "suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed." *Munro v. United States*, (1937) 303 U.S. 36, 41; *United States v. Sherwood*, (1941) 312 U.S. 584, 586.

No elaborate citation of cases is necessary to establish that where rights against the United States are concerned, as in all cases of new rights created by statute, the limitation is not procedural but an element of the right and "sets a limit to the existence of what it creates." *Atlantic Coast Line R.R. Co., v. Burnette*, (1915) 239 U.S. 199, 201; *Engel v. Davenport*, (1926) 271 U.S. 33, 38; *Kakara v. United States*, (9th Cir., 1946) 157 F. 2d 578; *Sgambati v. United States*, (2d Cir., 1949) 172 F. 2d 297, cert. den. 337 U.S. 930; *Mejia*

v. *United States*, (5th Cir., 1945) 152 F. 2d 686, cert. den. 328 U.S. 862; *Rose v. United States*, (E.D. N.Y., 1947) 73 F. Supp. 759.

The Government submits that this matter of limitations without more sustains completely the dismissal of appellant's libel by the court below. But because of the importance of the questions of exclusiveness and election for the administration of the Federal Employees' Compensation Act, the remainder of our brief will discuss those questions with particular emphasis upon the absence in the appellant of any special contract right to full wages until his complete recovery, and of the binding force of appellant's irrevocable election of compensation in accordance with the requirements of the Act of July 1, 1944, c. 373, 58 Stat. 712.

## II

**Appellant's rights under the applicable compensation, leave and retirement statutes are exclusive of recovery by suit; the nature of the operation of civil service manned Army and Navy vessels confirms the necessity of this result.**

Appellant's recovery on his first and second claims, for damages by unseaworthiness and for maintenance money, is precluded by the existence of his rights under the applicable system of compensation, leave and retirement statutes. The Government submits that absent an explicit statutory command for double recovery or election, where compensation is available the right thereto of government personnel, whether in the civil or military service, is exclusive and precludes the existence of any cause of action for service-incident injury or disease despite the undoubted existence of a judicial remedy for the enforcement of such a cause of action if there was one. This view of the matter, recently ap-

plied by the Supreme Court in *Feres v. United States*, (1950) 340 U.S. 135, to military service employees, has equally been applied to civil employees by the Courts of Appeals for the Second, Third, Fifth and District of Columbia Circuits. *Mandel v. United States*, (3d Cir., decided August 16, 1951); *Johansen v. United States*, (2d Cir., decided July 30, 1951); *Lewis v. United States*, (D.C. Cir., 1951) 190 F. 2d 22; *Posey v. Tennessee Valley Authority*, (5th Cir., 1937) 93 F. 2d 726. See also *O'Neal v. United States*, (E.D. N.Y., 1925) 11 F. 2d 869, aff'd (2d Cir., 1926) 11 F. 2d 871; *Lopez v. United States*, (S.D. N.Y., 1944) 59 F. Supp. 831. The Fourth Circuit alone has explicitly held the contrary. *United States v. Marine*, (4th Cir., 1946) 155 F. 2d 456, followed in *Johnson v. United States*, (4th Cir., 1950) 186 F. 2d 120.

We submit that this unanimity of decision in four circuits should be accepted by this Court as controlling in this present case, despite the minority view of the Fourth Circuit. If accepted, it is dispositive of appellant's entire case except in respect of his third claim, for damages for breach of an alleged special contract to pay him full wages until fully recovered. This special contract claim of appellant is discussed hereafter (Points III and IV, *infra*; pp. 27-39). So far as concerns the rights of appellant on his first and second claims, for unseaworthiness and for maintenance money under the general law maritime, whether statute or jurisprudence, we believe that the principles established by these majority decisions dispose of every contention which can be presented in this case. Those cases settle that in every instance, unless Congress has in express terms provided for double recovery or election, all government personnel, of whatever type, civil or military, afloat or ashore, are limited exclusively to their recovery under the particular compensation, leave and

retirement statutes applicable to employees of their type and cannot recover for service-incident injury or illness by suit against the United States.

In particular the *Mandel*, *Johansen* and *Lopez* cases, dealing with members of the civilian component of the crew of Army Transport vessels, such as appellant here, establish that their rights as government employees to benefits under the applicable compensation, leave and retirement acts, precludes them from the grant of the rights given by the War Shipping Administration (Clarification) Act to Government merchant seamen. They further expressly declare that the compensation amendment Act of October 14, 1949, c. 691, 63 Stat. 854, did not alter or affect in any way the previous exclusive rights of the civilian component of the crew of Army and Navy vessels. See *Mandel v. United States*, where the Third Circuit said (slip op. p. 4, fn. 8), "What little legislative history is available indicates only that Congress did not wish to legislate affirmatively on the rights of seamen because no discussions of the problem had been had in committee." And see the similar statement of the district court in *Johansen*, (S.D. N.Y.) 1951 A.M.C. 117 (aff'd 2d Cir., July 30, 1951) that "It is plain that the amendments of 1949 were not intended to change the prior rights of seamen except to the extent of further coverage under the Act." The reason for this continued exclusiveness of compensation where civilian crew members of Army and Navy vessels are involved is obvious upon consideration of the nature of their operations and the legislative history of the Clarification Act of 1943.

The vessels of the Army Transport Service, now succeeded by the Military Sea Transportation Service, whether troop transports or hospital ships (see *Lopez*, *supra*) or tugs (see *Mandel*, *supra*) are not merchant vessels but auxiliaries to the fleet and are operated for

the military function of transporting troops and their supplies in forward areas.<sup>6</sup> The employment of these vessels in an integral part of military operations frequently involving their use, as in the *Mandel* case, in the immediate presence of the enemy. It is for that reason that the military authorities have absolute power of control over their personnel, both military and civilian, enforced by the most rigorous sanctions. Army transport tugs and ships are in all respects military vessels with crews whose members, civilian and military alike, are subject to military law. "It is unthinkable that Congress did not mean to include persons in the United States Army Transport Service, engaged in transporting our armies and sustaining them with equipment and supplies." *Ex parte Falls*, (D. N.J., 1918) 251 Fed. 415, 416; *Ex parte Gerlach*, (S.D. N.Y., 1917) 247 Fed. 616. See also the preliminary paragraph of appellant's permanent agreement of enrollment, Libellant's Exhibit 4, Appx. 16a).

Most of these Army and Navy transport vessels have crews consisting of both military and civil components. Thus, on hospital ships, the deck and engine room force are civil employees while the medical crew are in the military service. The status of both the civil and military service components of the crews of these vessels is similar; their rights and discipline are similar, except that the civilians are free to quit at the end of any voyage. See *Mandel* (slip op. p. 5); *Johansen* (slip op. p. 1764).

Such civil service crew members of army and navy vessels resemble in no way the merchant seamen of

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<sup>6</sup> The carriage of civilian government employees, of dependents of military and civil service personnel, and of evacuees, together with the personal and household effects of such persons, is a secondary activity. When undertaken, it is solely in furtherance of the Government's interest, not for profit, and only when space would otherwise not be used.

private vessels nor the merchant seamen of vessels of the former War Shipping Administration and its new successor, the National Shipping Authority. Their resemblance is much closer to that of the military crew members of the military service component of the crew who stand beside them on the deck exposed to the same risks and subject to the same orders. Congress could not have contemplated that the civil service component of the crew of armed forces vessels should enjoy at once both the right to compensation, leave and retirement benefits, which the military service component enjoys and at the same time the right of recovery by suit against the United States which is the exclusive right of WSA merchant seamen. It is impossible to believe that Congress, while limiting military service crew members to compensation, leave and retirement rights and excluding merchant crew members therefrom and making their right of recovery by suit exclusive, intended civil service crew members of armed forces vessels to enjoy both types of rights or the chance to elect between them. We believe, as Mr. Justice Jackson said in *Feres v. United States*, (1950) 340 U.S. 135, 144, that the absence of explicit statutory direction by Congress for double recovery or election is persuasive that the rights under the applicable, compensation leave and retirement statutes were regarded as exclusive.

If recovery by suit for service-incident injury or illness of civil service crew members of armed forces and other regular public vessels was available in addition to their compensation, leave and retirement rights, the adoption of the War Shipping Administration (Clarification) Act, 1943, (57 Stat. 45, as amended, 50 Appx. U.S.C. 1291) would, as the Second Circuit pointed out in *Bradey v. United States*, (2d Cir., 1945) 151 F. 2d 742, 743, cert. den. 326 U.S. 795, have been



unnecessary. When World War II began it was already the law of two circuits (and no conflict existed elsewhere) that suits for death and injury of persons other than crew-members of the public vessel involved could be brought under the Public Vessels Act in accordance with its literal language. *Dobson v. United States*, (2d Cir., 1928) 27 F. 2d 807, 808, cert. den. 278 U.S. 653; *New England Maritime Co. v. United States*, (1st Cir., 1934) 73 F. 2d 1016, affirming per curiam (D. Mass., 1932) 55 F. 2d 674, 685. Thus it was only because of the belief, in Congress and elsewhere, that the right to compensation benefits would preclude any right of recovery by suit on the part of civil service crew members of public vessels that such legislation was necessary at all.

The general understanding in and out of Congress at that time was that the exclusive right of both civil and military service crew members of armed forces vessels was compensation, and that WSA merchant seamen were being fairly dealt with when they were given in exchange for the government seamen's right of compensation the same right of recovery by suit, but without compensation, which had always been the exclusive right not only of private merchant seamen, but of government merchant seamen engaged in the peacetime commercial operations of the Shipping Board and Maritime Commission.<sup>7</sup> This understanding was emphasized in the report of the Chairman of the Compensation Commission to the House Merchant Marine Committee commenting on the clarification bill. It stated:

It is the Commission's understanding of the proposed legislation that its application is to be limited to seamen employed by or on behalf of

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<sup>7</sup> This was the consequence of certain unpublished decisions of the Comptroller General, see our *Vatuone* brief, p. 52, fn. 19.

the War Shipping Administration, and that the rights heretofore long enjoyed by seamen in other Federal services, who have acquired status as civil employees of the United States, will not be disturbed or affected. In this connection it may be pointed out that in services such as the Army Transport Service, seamen have been employed directly as civil employees of the United States and for many years have received the protection of the Federal Employees' Compensation Act.

As to seamen in the Army Transport Service, it should be noted that the protection afforded by the Federal Employees' Compensation Act is far greater than that contemplated for seamen by the bill, H. R. 7424. The bill apparently would merely provide a basis for recovery of damages for injury or death only in the very limited class of cases where the employer was negligent. \* \* \* <sup>8</sup>

Congress took this action as to War Shipping Administration seamen because it was thought undesirable to assimilate the rights of the large numbers of merchant seamen (temporarily in government service in order to man the cargo vessels supporting the war effort and which it was expected would be regarded as not in merchant but in exclusively public vessel employment) to those of the Army Transport seamen, who worked alongside their military associates, and to other peacetime public vessel seamen who were regular government employees under the Federal Employees' Compensation Act and the regular leave and Civil

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<sup>8</sup> House Merchant Marine and Fisheries Committee, 77th Cong., 2d Sess., Hearings on H.R. 7424 (Sept. 2, 1942), p. 6; H. Rep. 107, 78th Cong., 1st Sess., p. 34. Cf. *Mandel v. United States*, (3d Cir., August 16, 1951, slip op. p. 5), "We think that in general the natural inference would be that the [Federal Employees'] Compensation Act represents the substitution of a more enlightened form of remedy for industrial accidents than the ordinary tort action for damages."

Service Retirement Acts.<sup>9</sup> In explaining to Congress the situation which induced the War Shipping Administration to ask for this status for its seamen, its General Counsel stated:<sup>10</sup>

As private employees, seamen are entitled to the protection of the old-age benefit provision of the Social Security System; they and their dependents may recover damages for injury or death of seamen through the provisions of the Jones Act, they are protected by other remedies and they have certain rights with respect to allocations of wages. When the same seamen work on vessels which are bareboated or owned by the War Shipping Administration they become Government employees and these rights, which union labor has learned to prize very highly, either cease to exist or are substantially impaired [where vessels are not employed as merchant vessels but solely as public vessels]. In exchange for such lost privileges, these seamen acquire special privileges of Government employees such as right to compensation for injury under the United States Compensation Act, a questionable right to retirement benefits and other rights peculiar to Government employees.

Seamen constantly interchange between time chartered vessels on which they are private em-

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<sup>9</sup> In February and March 1942, when War Shipping Administration was created and proceeded to requisition the American merchant fleet and inaugurate its plan for direct government operation, the entire merchant fleet was privately operated, employing some 55,000 seamen. Ninety percent of the 1,375 ocean-going vessels were privately owned. Ten percent were government-owned but were demised by the Maritime Commission for private operation. Less than 50 comparable public vessels, plus a few tugs and harbor craft, were operated by the Army Transport Service with civilian crews. On V-J day in August 1945, there were over 220,000 seamen manning some 4,300 vessels which remained of the 5,200 ships built by the Maritime Commission plus the original 1,375.

<sup>10</sup> House Merchant Marine and Fisheries Committee, 77th Cong., 2d Sess., Hearings on H. R. 7424 (Sept. 2, 1942), p. 14.

ployees, and bareboated or owned vessels on which the personnel becomes employees of the Government. The rights of seamen may thus change from voyage to voyage depending upon the particular status of the vessel upon which they happen to sail. In view of the interchangeability of seamen, this creates many administrative difficulties. Moreover, it seems to us that since the interval of Government operation represents but a temporary phase of the history of the merchant marine, it would be best to maintain the status of seamen as private employees with respect to such matters. [Matter in brackets supplied.]

In the course of the consideration of the Clarification Act, it was emphasized again and again that *merchant* seamen employed on Maritime Commission *merchant* vessels had *exclusively* the ordinary merchant seamen's rights against the United States *under the Suits in Admiralty Act*. But seamen employed on vessels engaged solely as *public vessels*, and not within the Suits in Admiralty Act, would have their exclusive recovery by compensation payments.<sup>11</sup> It was only to prevent any possibility of War Shipping Administration seamen being assimilated to army and navy and other regular public vessel seamen (whose compensation rights were recognized as exclusive) that the legislation was necessary. This legislative history thus confirms, as the Second Circuit recognized in *Bradey v. United States*, (2d Cir., 1945) 151 F. 2d 742, 743, that Congress intended compensation to provide both the military and civil service crew members of armed forces vessels with their exclusive recovery and such seamen were not to be given a right to sue the United

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<sup>11</sup> See S. Rep. 62, 78th Cong., 1st Sess., p. 5; H. Rep. 107, 78th Cong., 1st Sess., pp. 16, 34; S. Rep. 1813, 77th Cong., 2d Sess., p. 23; S. Rep. 1655, 77th Cong., 2d Sess., p. 19; H. Rep. 2572, 77th Cong., 2d Sess., p. 9. Maritime Commission merchant seamen had no right, under the Comptroller General's decisions, to compensation. See our *Vatuone* brief, p. 52, fn. 19.

States for the negligence of their military superiors and fellow crew members nor for the defects of their ships. Had this not been so the Clarification Act would have been unnecessary.

In our brief in the companion case, No. 12,906, *United States v. Vatuone*, we have discussed the various decisions and have argued in detail the reasons for the correctness of the majority rule adopted by four circuits and the absence of any reason for this Court to depart from it. We do not repeat that argument here but ask the Court to refer to our *Vatuone* brief for its complete presentation. The remainder of our argument in this brief, therefore, will deal only with the special questions presented by appellant's third claim, for breach of his alleged special contract for payment of full wages until his complete recovery. We will first examine, in Point III, whether there was such a special contractual undertaking by the United States, and then, in Point IV, whether appellant may avoid the irrevocable election which Congress by the Act of July 1, 1944, c. 373, 58 Stat. 712, prescribed as a condition precedent to payment of compensation benefits instead of any payments on benefits otherwise available by reason of the injury or illness of an employee in the government service.

### III

**Appellant has no claim for wages after his termination; his agreement of enrollment and the applicable regulations provided for wages only until his return to the continental United States.**

Appellant was paid full wages until his termination on October 9, 1947, following his return to the continental United States. His third claim is that, under his special contract of employment, even after his termination he still should have been paid full wages until his complete recovery. This he claims by reason

of one of the clauses of "paragraph 6" (apparently Article 7 is meant) of his original one-year employment contract of May 27, 1944 (Brief, pp. 9-10; Am. Lib. Arts. 18-24, R. 6-8, Appx. 4a-6a).

It is the Government's contention (1) that under appellant's permanent agreement of enrollment of March 14, 1945, which alone was in effect at the time of his termination on October 9, 1947, appellant was not entitled to wages after termination; (2) that appellant's original one-year employment contract of May 27, 1944, expired on May 27, 1945, if not before, was never renewed, and was not in effect at any time during his voyages, beginning July 5, 1945, and ending on July 8, 1947, out of which this present lawsuit arises; and (3) that in any event even appellant's unrenewed 1944 one-year employment contract did not provide for payment of wages after the contract period expired and appellant was terminated.

Appellant has received all wages to which he was entitled both as a seaman and as a government employee. As a seaman he was entitled under the general law maritime to wages only until his discharge at the conclusion of his last voyage on July 8, 1947.<sup>12</sup> As a government employee, under the applicable Marine Personnel Regulations of the Transportation Corps (by which appellant both in his 1945 permanent agreement of enrollment and in his original 1944 one-year employment contract agreed to be bound) appellant was entitled to wages, after discharge from his last voyage, only until he was returned to the continental United States.<sup>13</sup> And, even under Articles 7 and 13

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<sup>12</sup> *The Bouker No. 2* (2d Cir., 1917) 241 Fed. 831; *The E. H. Russell*, (E.D. N.Y., 1930) 42 F. 2d 568; *Crespo v. International Freighting Corp.*, 1948 A.M.C. 988.

<sup>13</sup> Regulation No 13, section 2, paras. 132.5-132.6, Regulation 16, section 3, para. 163.2, *infra*, Appx. 29a, 30a.

of appellant's unrenewed 1944 one-year employment contract (Libelant's Exhibit 3, Appx. 12a, 13a), appellant was not entitled to wages after his return to the continental United States.

1. Appellant's permanent agreement of enrollment, dated March 14, 1945 (Libelant's Exhibit 4, Appx. 15a), was effective from prior to his departure on his first South Pacific voyage from Los Angeles on July 5, 1945, and until his final termination on October 9, 1945, following his return to the continental United States. It provided that the entire matter of his employment rights should be determined by the sole will of the United States according to the War Department's regulations. By the terms of the agreement appellant enrolled "in accord with the conditions prescribed by law and regulations pertinent to such service," and agreed "to abide by the rules, regulations, customs and discipline of the service as may be now or hereafter established." The agreement further stated that appellant understood and agreed (Appx. 16a) that—

\* \* \* this constitutes an agreement of enrollment supplemental to my appointment as an employee of the Government under Civil Service Rules, Schedule A-IV-3 thereof, and that I am entitled to pertinent civil service rights, privileges and benefits thereunder, including special benefits applicable to marine employees of the War Department as may be pertinent thereto in accord with law and regulations.

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\* \* \* if the Government should exercise its right to relieve me prior to the conclusion of this term of enrollment for whatever reason, I may be disenrolled and my employment terminated at the pleasure of the Government and under such circumstances I shall have no further right or claim against the Government whatsoever, except as may be provided by law or regulations now or hereafter to be established.

Finally appellant agreed "to accept the Government's sole determination of the degree to which the Government adheres to the prevailing practice, as may be set forth now or hereafter in the rules and regulations promulgated by the Government with respect to employment on its vessels."

The Transportation Corps' regulations (*infra*, Appx. 29a), by which appellant thus agreed to be bound, provided that in the case of injury or illness not occasioned by the seaman's own delinquency or misconduct—

The basic wages will continue payable only until the conclusion of the voyage had the seaman continued to serve upon the vessel or until he returns to the continental limits of the United States, whichever is sooner. (Para. 132.6, Appx. 29a; cf. para. 163.2, Appx. 30a)

Thus in no event is appellant entitled under his special contract of employment, any more than under the general law maritime, to payment of full wages after his termination until his complete recovery.

Appellant was paid until his termination on October 9, 1947, long after his discharge at the conclusion of his voyage on July 8, 1947, and sometime after his return to the United States. This payment exceeded the requirements of the maritime law and constituted the "prevailing practice" according to the Government's "determination" which appellant had agreed to accept. Appellant has thus received both what he was entitled to as a seaman and as a government employee and has no right to anything more.

2. Appellant's original one-year employment contract of May 27, 1944, expired on May 27, 1945, was never renewed and therefore has no bearing on this case. Appellant's unrenewed one-year employment contract of May 27, 1944 (Libelant's Exhibit 3, Appx. 11a-15a), provided that he—



\* \* \* is hereby employed and agrees to serve on a vessel owned, operated, chartered, employed or controlled by the War Department, at any post of duty in the world to which he may be assigned, to be determined by the Government, for a period of one year from the effective date of this contract [Article 1].

\* \* \* \* \*

The period of service covered by this contract may be extended from year to year or any part thereof *upon agreement of both parties in writing prior to the completion of the one (1) year period of service* under this contract, or any succeeding renewed one (1) year period or any part thereof, *in which case* all the conditions applying to the contract during the first year will in like manner apply to each renewed year. \* \* \* [Article 17, emphasis supplied]

Since appellant's one-year contract was not renewed in writing or otherwise, it therefore expired not later than May 27, 1945,—long before the voyages beginning July 5, 1945, which are here involved. It thus has no bearing whatever on the case.

Indeed, appellant urged in his amended libel, and the court below found, that subsequent to appellant's 1944 one-year contract "a new contract was entered into between libelant and the United States of America by and through [the] Army Transport Service for [the] duration of the war" (Am. Lib. Art. 18, incorporating Art. 2, R. 6 and 3, Appx. 4a, 1a; Fndg. I, R. 35, Appx. 8a). This finding and allegation appears clearly correct and there is no evidence whatsoever to suggest that the 1944 one-year contract was ever renewed. To renew it would have been entirely inconsistent with appellant's action, prior to its expiration date of May 27, 1945, of enrolling as a permanent Army Transport employee for the duration of the war plus six months. The Army's Marine Personnel Regulations seem to make it plain that the

one-year renewable contract status and the permanently enrolled status are not only entirely distinct but even incompatible (Regulation No. 3, section 2, paras. 32.1 through 32.3, *infra*, Appx. 28a). Accordingly, the provisions of Article 7, or any other provision of Appellant's 1944 one-year contract have no bearing on his rights under his later permanent enrollment agreement.

3. But even if appellant's claim had arisen in 1944 under his unrenewed one-year contract (Libelant's Exhibit 3, Appx. 11a) still appellant would not be entitled to wages after his termination or the expiration of his contract. This is obvious from a critical reading of the whole of Articles 7 and 13 of the original 1944 one-year contract. They provide (Appx. 12a, 13a) :

7. The Employee shall be furnished medical and surgical care at the expense of the Government for illness or injury sustained while in line of duty not resulting from the Employee's own misconduct or delinquency. In the event of illness or injury occasioned by his employment but not due to the Employee's misconduct, the base wages of the Employee will continue during the period of such incapacity. Any such payments made shall be deemed payments on account of or in full, as the case may be, of any other compensation for sick leave to which the Employee might be entitled on account of such injury or illness. The Government will furnish, or otherwise provide without cost to the Employee, such medical treatment and hospitalization including subsistence as is necessary for the proper treatment of any such injury suffered or illness contracted while working for the Government; provided, such medical treatment or hospitalization will not be continued if the disability resulting from such injury or illness, in the judgment of a duly appointed medical officer of the United States Army or such other physician as may be designated by the Government, cannot be materially improved by further treatment or hos-

pitalization; and, in this event, the Government may terminate this contract in writing. Upon such termination, the Employee will be returned, at the expense of the Government, to the most convenient port in the United States, to be determined by the Government and at the option of the Employee to the port of his original departure from the United States.

\* \* \* \* \*

13. In the event that the Employee is unable to meet the satisfaction of the Government its standards and requirements for employment for the position in the within contract, the Government may cancel this contract and his employment, upon notice in writing to the Employee in which event, the Employee shall have no further rights under this contract or claim against the Government whatsoever, except that, if at the time of termination the Employee be at his post of duty outside the continental limits of the United States, the Employee shall be returned at the expense and convenience of the Government to the nearest continental United States port and continue his base wages hereunder until such arrival.

Article 7 directs that, although the seaman has not recovered and before the expiration of the one-year contract period, if the Government's doctors say the seaman cannot be "materially improved by further treatment," the Government may terminate the contract and "Upon such termination the employee will be returned, at the expense of the Government, to the most convenient port in the United States" or, at the employee's election, to his original port of departure from the United States. Article 13, provides that in cases of this sort the Government will "continue his base wages hereunder *until such arrival*" (emphasis supplied). Finally, by Article 18 of his 1944 one-year contract (Appx. 14a), appellant agreed to abide and be governed "by the rules, regulations, customs and dis-

cipline of the service.” These as we have already seen (*supra*, pp. 29-30) provided for payment of wages only until his return to the continental United States.

It thus appears that appellant’s special contract rights do not include wages after his termination. This is equally so whether his original 1944 one-year employment contract or his 1945 permanent agreement of enrollment applied at the time he was terminated on October 9, 1947.

#### IV

**Appellant’s acceptance of compensation precludes his recovery of wages just as his compensation, leave and retirement rights preclude his recovery for negligence, unseaworthiness and maintenance.**

Appellant’s third claim is for payment of his full wages until his complete recovery by reason of his special contract of employment.<sup>14</sup> He complains against being required to elect between pursuing this claim and receiving compensation and asserts a right to collect such wages despite his election. This is, however, absolutely prohibited by the express statutory language of the original compensation act of 1916. He cannot be successful in such a claim since compensation has been paid him and is still being accepted by him every month. Section 7 of the original 1916 Act (*supra*, p. 3) ex-

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<sup>14</sup> Appellant alleges he was terminated and paid to October 9, 1947. This was a time long after the end of his voyage on July 8, 1947. Under the general law maritime wages are not due after the end of the voyage—or of the next pay period thereafter when the man is employed by the month or week. *The Bouker No. 2*, (2d Cir., 1917) 241 Fed. 831; *The E. H. Russell*, (E.D. N.Y., 1930) 42 F. 2d 568; *Crespo v. International Freighting Corp.*, 1948 A.M.C. 988. Anything more must rest upon the terms of some special contract right, hence appellant’s reliance on his special employment contract here.

pressly forbids payment of unearned wages. It provides:

That as long as the employee is in receipt of compensation under this act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed \* \* \*

Thus any attempt to insert a contrary provision in the contract, such as appellant claims to enjoy here, would be absolutely void.

Appellant's argument, that any modifications of the statutes subsequent to the execution of his first employment contract of May 27, 1944, are invalid as an unconstitutional abrogation of his contract, is thus totally irrelevant to the facts of this case. No amendment has changed the 1916 law. The amendment of July 1, 1944, is purely procedural, requiring execution of a formal election document so as to avoid any contention that a claimant did not know that under section 7 of the original 1916 act application for compensation would bar him from all other claims. So the amendment of October 14, 1949, is purely declaratory of the pre-existing 1916 bar, merely stating the Federal Employees Compensation Act's exclusiveness in the more familiar form found in section 5 of the Longshoremen's Act (33 U.S.C. 905), so that there might be an end of the Fourth Circuit's minority view to the contrary. In any case, by its express terms and legislative history it does not apply to seamen whose rights are left the same as under the original 1916 law. See our *Vatuone* brief pp. 51-59. Both amendments leave appellant here just where he would have been if his entire case had occurred before May 27, 1944, when he was first employed. He may not collect both compensation and full wages. When he

elected to accept compensation payments, rather than continue with his contested claim for wages, it ended his claim although he failed to dismiss his law suit as was expected by the government officers who accepted his election as executed in good faith.

Appellant's original one-year employment contract was executed on May 27, 1944, his permanent agreement of enrollment on March 14, 1945. Shortly after the execution of his 1944 one-year contract and sometime before his execution of his permanent enrollment agreement, Congress adopted the Act of July 1, 1944, c. 373, 58 Stat. 712 (*supra*, p. 3). This act required, thereafter, as a condition precedent to payment of compensation to a government employee such as appellant, who claims to be entitled both to benefits under the Federal Employees' Compensation Act and also to other benefits because of his injury or illness in government service, that—

\* \* \* such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the Commission may for good cause allow, and *when made shall be irrevocable unless otherwise provided by law.* [Emphasis supplied]

Pursuant to this statutory requirement, appellant's award of compensation provided (Appx. 20a) that before any compensation payments could be made to him thereunder he must execute an irrevocable election in a special form prescribed for that purpose and attached to the award.<sup>15</sup>

Copies of the award, dated May 26, 1950 (Appx. 18a), of the election form and of the letter of May 31, 1950

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<sup>15</sup> This was in accordance with section 32 of the 1916 Act (5 U.S.C. 783) providing "That the Commission is authorized to make necessary rules and regulations for the enforcement of this Act, and shall decide all questions arising under this Act."

(Appx. 21a), transmitting them, were sent to appellant's attorney as well as to appellant himself. The election form did not require its execution by appellant's attorney as well as appellant. But there seems no doubt, in view of appellant's delay in executing the election until July 21, 1950, that appellant fully understood the significance of what he was doing and may have consulted his attorney. Indeed it does not appear that appellant claims that he was in any way misled. On the contrary, his contention, aside from "unconstitutionality," is that he took the compensation, albeit voluntarily, but under economic duress and coercion and is now entitled to repudiate his decision although he continues to collect payments every month. Thus, despite the 1916 prohibition against payment of "any salary, pay or remuneration whatsoever" while payments of compensation are available, appellant is here asking this Court to relieve him from the burden of the Congressional command.

It admits of no doubt that appellant's obligation is to know the law and to be bound by the legal consequences of his acts. Even the avuncular indulgence, which seamen enjoy by reason of their privileged status as wards of the admiralty judges, ought not to be enlarged to relieve Chief Engineer Allen of this obligation. Officers and members of the crews of vessels are not yet entirely above the laws which govern ordinary citizens. *Cf. Bohannon v. American Petroleum Transport Corp.*, (S.D. N.Y., 1949) 86 F. Supp. 1003, applying to a seaman the ordinary rule of *Federal Crop Ins. Co. v. Merrill*, (1947) 332 U.S. 380, and prior cases therein cited. Appellant acted with full knowledge and should be bound. The leading decision on the point is one by Justice Cardozo in a case arising prior to the Longshoremen's Compensation Act when all maritime workers were "seamen" under federal law. *Brassel v. Electric*

*Welding Co.*, (1924) 239 N.Y. 78, 145 N.E. 745, 746. There he said:

\* \* \* The question is whether a right of action has survived the collection of the award and the retention of the proceeds. The plaintiff made claim under the statute and must be charged with knowledge of its provisions. \* \* \* The situation is much the same as if an owner of a patent, after suing for infringement in a state court and pocketing the proceeds of a judgment in his favor, were to urge the exclusive jurisdiction of the federal courts as a reason why damages should be paid to him again. Consent and the estoppel flowing from consent would put him out of court. *Davis v. Wakelee*, 156 U.S. 680, 15 S. Ct. 555, 39 L. Ed. 578. Nor does the plaintiff help his case by crediting what he has received upon the damages recovered. By such a use of the money, payments made and accepted for one purpose are diverted to another. The defendant did not tender payment upon account of an unliquidated claim for damages to be enforced thereafter without prejudice, nor is there any evidence that the plaintiff so understood the effect of the acceptance. The payment was in full.

So in *Owens v. Hammond*, (N.D. Calif., 1934) 8. F. Supp. 392, a crew member, after having sought and obtained a compensation award, brought a libel in admiralty. His suit was dismissed, the court observing, "by the acceptance of the award \* \* \* an accord and satisfaction was reached upon libelant's claims arising from the injury in question, and he may not recover again in this court." Thus also in *The Fred E. Sander*, (W.D. Wash., 1914) 212 Fed. 545, 548, the court said, "If the libelant determined to obtain relief \* \* \* under such act, then he cannot proceed in admiralty and thus obtain double compensation for the injury \* \* \* [for he] has elected to accept under the act, and cannot therefore raise an action in admiralty."



We submit therefore that just as appellant's first two claims, for unseaworthiness and for maintenance money, are precluded by his rights to compensation, leave and retirement, so his third claim of a special contract right to full wages until complete recovery, is precluded by the statutory prohibition against payment of wages or salary after payment of compensation and by his election pursuant to the 1944 amendment.

#### CONCLUSION

For the foregoing reasons we believe (1) that the first amended libel was barred by limitations, (2) that recovery on appellant's claims for unseaworthiness and maintenance money is precluded by his exclusive right to compensation benefits, and (3) that appellant's claim for breach of contract to pay full wages until complete recovery is precluded by his acceptance of compensation. The dismissal of the amended libel by the court below was therefore correct and should be affirmed.

Respectfully submitted,

JAMES R. BROWNING,  
*Acting Assistant Attorney General,*

ERNEST A. TOLIN,  
*United States Attorney,*

LEAVENWORTH COLBY,  
KEITH R. FERGUSON,  
*Special Assistants to the  
Attorney General,*

BERNARD B. LAVEN,  
*Assistant United States Attorney,  
Attorneys for the United States.*

September 1951.



## APPENDIX

### 1. FIRST AMENDED LIBEL IN PERSONAM

[Title of Court and Cause Omitted; endorsed, filed  
Nov. 8, 1949]

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The libel of Jesse M. Allen, against the United States of America, in a cause of damages, maintenance and cure, civil and maritime, respectively shows:

**FIRST:** That upon information and belief, at all times herein mentioned, the respondent United States of America, was the owner of the United States Army FS 411, FS 292, BC 514, USAT ETOLIE, and FS 370.

**SECOND:** That on or about the 27th day of May, 1944, libelant executed a written contract with respondent for employment in the Army Transport Service for a period of one year as a Junior Marine Officer (Engine), commencing May 27, 1944, at wages at the minimum rate of \$2200.00 per annum, overtime and bonus. That thereafter on March 14th, 1945, a new contract was entered into between libelant and the United States of America by and through Army Transport Service for duration of the war plus six months at wages, overtime and bonus, in accordance with the prevailing maritime practice.

**THIRD:** That libelant was a member of the crew of the FS 292, which commenced a voyage at Los Angeles Port of Embarkation, Wilmington, California, on the 5th day of July, 1945. Said voyage was to the Islands of the South Pacific and terminated on or about the 26th day of May, 1946, at Apra Harbor, Guam. That on the said 26th day of May, 1946, libelant was assigned as First Assistant Engineer on the FS 411 at Apra Harbor, Guam, and continued to serve thereon until the 8th

day of July, 1947. That during said voyage on or about the 11th day of June, 1946, libelant was promoted to Chief Engineer and remained as such until the termination of said voyage.

**FOURTH:** That the respondent failed to provide libelant with seaworthy vessels. That on the initial voyage of the FS 411 from Guam to Japan, said vessel broke down and libelant was required to perform labor beyond the call of duty, working for long hours, in smoke and gas fumes, without proper or any oxygen breathing equipment; that thereafter during libelant's service upon the FS-411 said vessel broke down on seven different voyages during which times libelant was required to perform labor beyond the call of duty, working as many as twenty hours a day, in smoke and fumes without proper or any oxygen breathing equipment.

**FIFTH:** That the respondent failed to furnish libelant with a seaworthy vessel in that the ventilating system upon said vessel, including the exhaust fans in the engine room, were inoperative for over a period of fourteen months. That libelant was required to work and live under conditions of extreme heat without adequate or any ventilation, and that by reason of the said vessel, the FS 411, breaking down at sea on approximately twelve occasions, the said FS 411 and FS 370 did not have adequate or proper water and food for libelant's necessary daily use.

**SIXTH:** That as a proximate result of the aforesaid conditions, libelant became ill with tuberculosis. That said illness from which libelant was suffering was diagnosed as tuberculosis on or about the 25th day of October, 1947.

**SEVENTH:** That by reason of the premises as aforesaid, libelant has been generally damaged in the sum of Fifty Thousand Dollars (\$50,000.00).

**EIGHTH:** That at all times herein mentioned, libelant was and is a resident of the County of Los Angeles, State of California, and within the jurisdiction of the United States District Court in and for the Southern District of California, Central Division.

**NINTH:** That this action is brought pursuant to the provisions of Public Vessels Act, 46 U.S.C.A., Section 781 Seq.

**TENTH:** That libelant is a seaman within the designation of persons permitted to sue herein without furnishing bond for, or prepayment of, or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Sec. 1916, U.S.C.A.

**ELEVENTH:** That at all times herein mentioned, libelant was an employee of the United States of America by and through the Army Transport Service.

**TWELFTH:** That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of this Honorable Court.

**FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION,** libelant alleges:

**THIRTEENTH:** Libelant refers to Articles One to Six, and Eight to Twelve and incorporates the same herein and makes the same a part hereof as if they are fully set forth.

**FOURTEENTH:** That by reason of the premises herein libelant became totally disabled from any work on or about the 25th day of October, 1947, and will remain totally disabled from any occupation for a period of from two to three years from the date hereof.

**FIFTEENTH:** That by reason of the premises herein, libelant is entitled to recover from the respondent

the United States of America, maintenance in the sum of \$6.50 per day from the 19th day of January, 1948, to the date hereof, and thereafter until he has reached the maximum degree of recovery.

SIXTEENTH: That the maintenance to which libelant is entitled to the date hereof was and is the sum of \$6,418.00; that libelant prays leave to amend this article at the time of trial and therein set forth the amount of maintenance to which he is entitled at that date.

SEVENTEENTH: That libelant has been under the care of duly licensed physicians and surgeons in the treatment of his illness from August 1947, to the date hereof, and will so remain for two to three years from the date hereof.

FOR A THIRD, SEPARATE AND DISTINCT CAUSE OF ACTION, libelant alleges:

EIGHTEENTH: Libelant incorporates herein by reference and makes a part hereof as if fully set forth herein, Articles First to Sixth, and Eighth to Twelfth inclusive, of his First Cause of Action.

NINETEENTH: That pursuant to contract of employment entered into by libelant with respondent, said contract provided in part as follows: The Employee shall be furnished medical and surgical care at the expense of the Government for illness or injury sustained while in line of duty not resulting from the Employee's own misconduct or delinquency. In the event of illness or injury occasioned by his employment but not due to the Employee's misconduct, the base wages of the Employee will continue during the period of such incapacity. Any such payments made shall be deemed payments on account of or in full, as the case may be, of any other compensation for sick leave to

which the Employee might be entitled on account of such injury or illness. The Government will furnish or otherwise provide without cost to the Employee, such medical treatment and hospitalization including subsistence as is necessary for the proper treatment of any such injury suffered or illness contracted while working for the Government provided, such medical treatment or hospitalization will not be continued if the disability resulting from such injury or illness, in the judgment of a duly appointed medical officer of the United States Army or such other physician as may be designated by the Government, cannot be materially improved by further treatment or hospitalization, and, in this event, the Government may terminate this contract in writing. Upon such termination, the Employee will be returned, at the expense of the Government, to the most convenient port in the United States, to be determined by the Government and at the option of the Employee to the port of his original departure from the United States.

**TWENTIETH:** At the time libelant became ill with tuberculosis, as aforesaid, his base wages pursuant to a contract entered into between libelant and respondent on the 27th day of May, 1944, as amended, was the sum of \$6,997.00.

**TWENTY-FIRST:** That on the 9th day of October, 1947, respondent herein terminated wage payments to libelant herein under his contract of employment.

**TWENTY-SECOND:** That libelant has been totally disabled from the 25th day of October, 1947 by reason of the illness as aforesaid and will remain totally disabled for a period of not less than two years from the date hereof, this 4th day of November, 1949.

**TWENTY-THIRD:** That by reason of the premises as aforesaid, libelant is entitled to recover from re-

spondent his base wages in the sum of \$6,997.00 per year from the 25th day of October, 1947, to the termination of his disability occasioned by the illness incurred in his employment as aforesaid.

TWENTY-FOURTH: That by reason of the premises herein, libelant is entitled to recover from respondent pursuant to his contract of employment for wages during the period of his disability by reason of illness, the sum of \$14,204.65. That libelant prays to amend this article at the time of trial to set forth therein the sum of money which he is entitled to recover at that date pursuant to his contract of employment.

WHEREFORE, libelant prays that a citation in due form of law, according to the course of this Honorable Court in cases of Admiralty and Maritime jurisdiction, may issue against the respondent United States of America, and that they may be required to appear and answer this libel and all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree payment to libelant by respondent United States of America of \$70,622.65, together with his costs of suit incurred herein and for such further relief as may be just and proper.

DAVID A. FALL  
*Proctor for Libelant*



## 2. ORDER FOR DECREE

[Title of Court and Cause omitted; endorsed, filed  
June 12, 1951]

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This suit having been tried and submitted for decision; and it appearing to the court:

(a) that libelant brought this action pursuant to the Public Vessels Act (46 U.S.C. §§ 781, *et seq.*) to recover damages arising from personal injury, founding his claims upon asserted tort and contract (see *American Stevedores v. Porello*, 330 U.S. 446, 454 (1947); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371 (1932); and see *Jentry v. United States*, 73 F. Supp. 899 (D.C.Cal. 1947));

(b) that following libelant's injury (see 5 U.S.C. § 790) he applied for and received compensation under the Federal Employees Compensation Act (5 U.S.C. §§ 751 *et seq.*); and

(c) that acceptance of such compensation bars any other remedy libelant may have against the United States "for the same injury" (*Dahn v. Davis*, 258 U.S. 421, 432 (1922); *Gibbs v. United States*, 1951 Am. Mar. Cas. 119, 125 (N.D.Cal. 1950));

IT IS NOW ORDERED that final decree be rendered for respondent.

IT IS FURTHER ORDERED that proctors for respondent submit findings of fact and conclusions of law and decree accordingly (Fed. R. Adm. 46 $\frac{1}{2}$ ) pursuant to local rule 7 within ten days.

IT IS FURTHER ORDERED that the Clerk this day serve copies of this order by United States mail on the proctors for the parties to this suit.

June 12, 1951

WM. C. MATHES  
*United States District Judge*

## 3. FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Title of Court and Cause omitted; endorsed, filed  
June 22, 1951]

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The above cause having come on the 26th day of February, 1951, the parties appearing by their respective proctors at said trial, oral and documentary evidence having been introduced by and on behalf of the parties, and the matter having been argued and submitted and the Court being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

## I

That on May 27, 1944 libelant executed a written contract with respondent for employment in the Army Transport Service for a period of one year as a Junior Marine Officer (Engine), commencing May 27, 1944; that thereafter, on March 14, 1945, a new contract was entered into between libelant and the United States of America by and through Army Transport Service for duration of the war plus six months.

## II

That said agreements provided, among other things, as follows:

“The Employee shall be subject to such benefits as he may be entitled to under the United States Employees’ Compensation Act of September 7, 1916, as amended, for injury sustained while in the performance of his duty.”

## III

That in accordance with the orders and assignments as an employee of the respondent the libelant was a member of the crew of the FS 292, which commenced a voyage at Los Angeles Port of Embarkation, Wilmington, California, on the 5th day of July, 1945. Said voyage was to the Islands of the South Pacific and terminated on or about the 26th day of May, 1946, at Apra Harbor, Guam. That on or about the 26th day of May, 1946, libelant was assigned as First Assistant Engineer on the FS 411 at Apra Harbor, Guam, and continued to serve thereon until the 8th day of July, 1947. That during said voyage, on or about the 11th day of June, 1946, libelant was promoted to Chief Engineer and remained as such until the termination of said voyage.

## IV

That prior to the institution of this suit libelant executed and filed with respondent a claim under the Federal Employees' Compensation Act for compensation benefits and payments, on account of having become ill with tuberculosis during the term of his employment under said contracts.

## V

That following the execution and filing of said claim for compensation under the Federal Employees' Compensation Act, as aforesaid, libelant received and accepted compensation payments for said illness from the United States Employees' Compensation Commission subsequent to the institution of this suit.

## VI

That libelant applied for, received and accepted compensation payments voluntarily, without coercion, duress, misrepresentation or undue influence of any nature

whatsoever, and with full knowledge and awareness that he was applying for and receiving from respondent payments on account of compensation for his illness, under the Compensation Act.

## CONCLUSIONS OF LAW

### I

That this Court has jurisdiction of the parties and the subject matter of this suit under the Public Vessels Act, 46 U.S.C. 781, et seq.

### II

That libelant, in accepting compensation provided under the Federal Employees' Compensation Act, made his election to accept compensation under said Act.

### III

That libelant, by acceptance of compensation under the Federal Employees' Compensation Act, made an election which bars and estops him from recovery in this action under the Public Vessels Act.

### IV

That respondent is entitled to a decree dismissing the libel with costs in respondent's favor.

Let a decree and judgment be entered accordingly.

DATED: June 22, 1951

WM. C. MATHES  
*United States District Judge*

## 4. EMPLOYMENT CONTRACT

[Endorsed, Libelant's Exhibit 3]

This CONTRACT, executed and entered into this 27 day of *May, 1944*, effective the 27 day of *May, 1944*, between the UNITED STATES OF AMERICA (herein called the "Government"), represented by the Contracting Officer executing this agreement and *Jesse McDonald Allen* applicant, of *2075 Euclid Ave., Long Beach, Cal.* (herein called the "Employee"), WITNESSETH:

1. The Employee, on his representation that he is an experienced and qualified *Jr. Marine Officer (Engine)*, and is willing and desirous of enrolling in the Transportation Corps as a marine employee, is hereby employed and agrees to serve on a vessel owned, operated, chartered, employed or controlled by the War Department at any post of duty in the world to which he may be assigned, to be determined by the Government, for a period of one year from the effective date of this contract. From the effective date of this contract, the employee agrees to serve at the minimum rate of \$2200 Dollars per annum. The Employee shall be paid in addition thereto such increases in wages as he may be entitled to by the Maritime War Emergency Board Decisions relating to war bonuses and prevailing practice of the maritime industry as may be adopted by the War Department from time to time under its policy of conforming with the prevailing practice. Payment of the base wages will commence upon the effective date of this contract and payment of the aforementioned increase in wages will be paid as may be prescribed by competent authority to conform with the prevailing maritime practice.

\* \* \* \* \*

6. The Employee shall be subject to the benefits of the Civil Service Retirement Act of 1930, as amended, and the basic wages in amount specified above will be subject to a deduction of five percent (5%) for retirement pay in accord with existing law.

7. The Employee shall be furnished medical and surgical care at the expense of the Government for illness or injury sustained while in line of duty not resulting from the Employee's own misconduct or delinquency. In the event of illness or injury occasioned by his employment but not due to the Employee's misconduct, the base wages of the Employee will continue during the period of such incapacity. Any such payments made shall be deemed payments on account of or in full, as the case may be, of any other compensation for sick leave to which the Employee might be entitled on account of such injury or illness. The Government will furnish, or otherwise provide without cost to the Employee, such medical treatment and hospitalization including subsistence as is necessary for the proper treatment of any such injury suffered or illness contracted while working for the Government; provided, such medical treatment or hospitalization will not be continued if the disability resulting from such injury or illness, in the judgment of a duly appointed medical officer of the United States Army or such other physician as may be designated by the Government, cannot be materially improved by further treatment or hospitalization; and, in this event, the Government may terminate this contract in writing. Upon such termination, the Employee will be returned, at the expense of the Government, to the most convenient port in the United States, to be determined by the Government and at the option of the Employee to the port of his original departure from the United States.

8. The Employee shall be subject to such benefits as

he may be entitled to under the United States Employees' Compensation Act of September 7, 1916, as amended, for injury sustained while in the performance of his duty.

\* \* \* \* \*

13. In the event that the Employee is unable to meet to the satisfaction of the Government its standards and requirements for employment for the position in the within contract, the Government may cancel this contract and his employment, upon notice in writing to the Employee in which event, the Employee shall have no further rights under this contract or claim against the Government whatsoever, except, that, if at the time of termination the Employee be at his post of duty outside the continental limits of the United States, the Employee shall be returned at the expense and convenience of the Government to the nearest continental United States port and continue his base wages hereunder until such arrival.

14. In the event conditions in the area to which the Employee is assigned change either by reason of termination of hostilities between the United States and the enemy or by any other reasons to be determined by the Government as not warranting the continued employment of the Employee under this contract, the Government shall terminate this contract by notice in writing and the Employee shall be returned to the port of hire in the United States at the expense and convenience of the Government and be paid his base wages until his arrival at such port in the United States and the Employee shall have no further rights under this contract or claim against the Government whatsoever.

15. The provisions herein contained shall be deemed to include and be the equivalent of the prevailing employment conditions in the maritime industry.

\* \* \* \* \*

17. The period of service covered by this contract may be extended from year to year or any part thereof upon agreement of both parties in writing prior to the completion of the one (1) year period of service under this contract, or any succeeding renewed one (1) year period or any part thereof, in which case all the conditions applying to the contract during the first year will in like manner apply to each such renewed year. In the event the Employee's designation and/or rate of pay set forth herein be changed by mutual consent of the Government and the Employee, all other provisions of this contract herein contained shall remain valid and shall be applicable to such change of designation and/or rate of pay.

18. The Employee further agrees by the act of enrollment in the Transportation Corps as a marine employee, as evidenced by the within contract, to abide by the rules, regulations, customs and discipline of the service and to obey the lawful orders of his superior officers and all persons in authority pursuant to the customs of the service and to be governed by them during such enrollment. In the event the Employee breaches the rules, regulations, customs and discipline of the service, the provisions of paragraph 12 of the within contract will be invoked and the Employee shall have no further rights under this contract or claim against the Government whatsoever.

19. In case of injury or illness, the Government will notify (Name) *Mrs. Claude S. Allen*, (Relation) *Mother* (Street address) *2075 Euclid Ave.*, (City) *Long Beach*, (State) *Cal.*

20. Subscribed at (City) *St. Petersburg*, (State) *Fla.*, place of hire, this 27 day of *May*, 1944.

(Signature) *Jesse McDonald Allen*



21. The services of (Name in full) *JESSE MC DON-  
ALD ALLEN* as (position) *Jr. Marine Officer (En-  
gine)* from date and under conditions herein above  
stated are accepted.

[s] *Robert G. Fanelli*

ROBERT G. FANELLI

*Capt. T.C.*

*Army Representative Transportation Corps  
Marine Officer Cadet School*

#### 5. AGREEMENT OF ENROLLMENT

[Endorsed Libelant's Exhibit 4]

---

#### CERTIFICATE OF ENROLLMENT

#### MARINE SERVICE OF THE TRANSPORTATION CORPS AGREEMENT

State of *Louisiana* }  
City or Town *New Orleans* } ss:

I, *Jesse M. Allen*, a citizen of the United States, do hereby voluntarily enroll this *14th* day of *March 1945*, as a Transportation Corps civilian marine employee of the War Department at any assigned post of duty in the world to be determined by the Government for a period of *Duration of War plus Six Months*, in accord with the conditions prescribed by law and regulations pertinent to such service, unless sooner released by proper authority and do also agree to accept from the United States such pay, rations and allowances, as may be prescribed or established by law or regulation, including items of uniform and clothing issued incident to my formal training, and do also agree to abide by the rules, regulations, customs and discipline of the service as may be now or hereafter established and to obey the lawful orders of my superior officers and all persons in authority pursuant to the customs of the service and to

be governed by them. I understand that employees of the War Department, serving with the Armies of the United States, in time of war are subject to the Articles of War, and in time of peace are subject to the Articles of War only when serving outside the continental limits of the United States. I understand that this constitutes an agreement of enrollment supplemental to my appointment as an employee of the Government under Civil Service Rules, Schedule A-IV-3 thereof, and that I am entitled to pertinent Civil Service rights, privileges and benefits thereunder, including special benefits applicable to marine employees of the War Department as may be pertinent thereto in accord with law and regulations.

1. I agree if the Government should at any time determine that I have breached the rules, regulations, customs and discipline of the service or that I have refused, neglected or failed to prosecute assigned duties to the satisfaction of the Government or its authorized officers or agents or be unable to prosecute assigned duties by reason of illness due to misconduct, unauthorized absence or other insubordination or misconduct, or I am unable to meet to the satisfaction of the Government or its authorized officers the standards and requirements for employment, or in the event conditions in the area in which I may be employed change either by reason of termination of hostilities, or for any other reasons to be determined solely by the Government as not warranting my continued employment or if the Government should exercise its right to relieve me prior to the conclusion of this term of enrollment for whatever reason, I may be disenrolled and my employment terminated at the pleasure of the Government and under such circumstances I shall have no further right or claim against the Government whatsoever, except as

may be provided by law or regulations now or hereafter to be established.

2. I agree that if I breach this agreement of enrollment prior to the completion of the period agreed on herein that I may be required to reimburse the Government for the reasonable value to it for any expense incurred in connection with formal training made available to me by the Government up to the date of such breach, and I also agree that in the event I breach this agreement of enrollment, to reimburse the Government for the reasonable cost of any travel which may have been performed by me at Government expense to my first duty station after enrollment. Under such circumstances if the Government has previously taken any action towards acquiring for me a special status under the Selective Service and Training Act by virtue of my employment with the Government I understand that the Government may notify the appropriate Selective Service Board of my breach of contract.

3. I understand that the policy of the Government is to follow so far as may be practicable the prevailing practice of the maritime industry with respect to employment on its vessels. I agree as a condition of this enrollment to accept the Government's sole determination of the degree to which the Government adheres to the prevailing practice, as may be set forth now or hereafter in the rules and regulations promulgated by the Government with respect to employment on its vessels.

[s] *Jesse M. Allen*

Signature of Enrollee

On this *14th* day of *March* before me appeared *Jesse M. Allen*, who, in my presence, subscribed the foregoing

certificate of enrollment, and duly acknowledged to me that he had so subscribed same as his voluntary act.

[s] *Minturn M. Snider*

MINTURN M. SNIDER,  
*1st Lieutenant, TC*  
*Summary Court*

\* \* \* \* \*

Accepted for the Government this *14th* day of *March* 1945.

[s] *Minturn M. Snider*

(Signature of Enrolling Officer)

MINTURN M. SNIDER

*1st Lieutenant, TC*

*Asst. Industrial Personnel Officer*

## NEW ORLEANS PORT OF EMBARKATION

### 6. AMENDED COMPENSATION AWARD

[Title of Bureau and Cause Omitted; Part of  
Respondent's Exhibit A]

---

Compensation Order having been filed herein on July 18, 1949, which rejected claim of the above named for compensation benefits because the disability for which claim was made was not the result of an injury in the performance of duty and was not proximately caused by the employment, and application for review having been filed by the claimant for modification of such decision, and upon consideration thereof, the Bureau makes the following

### AMENDED FINDINGS OF FACT

That after the further consideration of this claim the previous action taken on July 18, 1949, is hereby re-

scinded, and the bilateral pulmonary tuberculosis from which this employee was found to be suffering on August 14, 1947, is found to have been proximately caused by the conditions of his employment as Chief Engineer for the Department of the Army, San Francisco Port of Embarkation.

That the claimant above named is found to be entitled to benefits of the Federal Employees' Compensation Act for the bilateral pulmonary tuberculosis, at the rates specified below, provided he executes and delivers the election specified herein:

<i>Claimant's Rate of Pay</i>	<i>Per Cent of Monthly Pay</i>	<i>Compensation Rate</i>
\$6,457.00 per annum plus subsistence and quarters of \$540.00 per annum or \$6,- 997.00 per year	Total maximum from October 13, 1947, to October 31, 1949	\$116.66 per month
	November 1, 1949, to April 30, 1950, at two-thirds	\$89.71 per week

That the claimant above named, having previously filed a libel in admiralty in the United States District Court, Southern District of California, Central Division, against the United States of America, shall be required to elect whether he intends to pursue his libel filed in the United States District Court or to receive benefits under the Federal Employees' Compensation Act.

Upon the foregoing facts it is ORDERED that there shall be paid from the Employees' Compensation Fund the following benefits: accrued compensation October 13, 1947, to October 31, 1949, at \$116.66 per month, \$2,869.84, and at \$89.71 per week from November 1,

1949, to April 30, 1950, \$2,319.56, or a total sum of \$5,189.40.

Monthly compensation shall thereafter be paid during the continuance of total disability at the rate of \$89.71 per week.

That before compensation is paid under this award the claimant shall be required to execute and return the attached election to receive benefits under the Federal Employees' Compensation Act in place of any benefits under any other Act of Congress, including the Public Vessels Act, Suits in Admiralty Act and the Federal Tort Claims Act.

Given under my hand at Washington, D. C. this 26 day of May 1950.

WM. McCAULEY  
*Director*

cc: Hon. Clyde Doyle  
House of Representatives  
Washington, D. C.

Commanding General  
San Francisco Port of Embarkation  
Fort Mason, California

Mr. H. G. Morison (re: HGM:LC 61-12-29)  
Assistant Attorney General  
Department of Justice  
Washington 25, D. C.

Mr. Jesse M. Allen  
1344 Stanley Avenue  
Long Beach, California

Mr. David A. Fall  
Attorney at Law  
1008 South Pacific Avenue  
San Pedro, California

7. BUREAU LETTER REGARDING ELECTION

[Part of Respondent's Exhibit A]

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U. S. DEPARTMENT OF LABOR

Bureau of Employees' Compensation  
Washington 25, D. C.

In reply refer to File No. X-400991  
May 31, 1950

Mr. Jesse M. Allen  
1344 Stanley Avenue  
Long Beach 4, California

Dear Mr. Allen:

There is herewith enclosed for your information copy of Compensation Order modifying the prior decision in connection with your claim for tuberculosis which you claim to have contracted prior to August 14, 1947, while employed as Chief Engineer by the Department of the Army, San Francisco Port of Embarkation.

If you will sign and return the enclosed election the compensation benefits in your case will be paid in accordance with the attached Compensation Order.

It is also suggested if you desire compensation payments that you complete and return the enclosed Form CA-8 to cover the entire period during which you have been disabled and lost pay since July 26, 1948. Your claim Form CA-4 is dated July 26, 1948, and you should bring your claim up to date by completing the first certificate on Form CA-8 to cover the period since July 26, 1948, and have your attending physician complete the medical certificate on the reverse side of Form CA-8. The Form CA-8 should then be returned to this Bureau.

In addition, if you have any dependents within the classes specified on the reverse side of the enclosed Form CA-4a you should complete and return the Form CA-4a in order that you may collect augmented compensation for any dependent which you may have. The aug-

mented compensation will only be payable for periods accruing on and after November 1, 1949, in accordance with the provisions of Public Law 357, 81st Congress.

When returning the election or in replying, kindly address the envelope for the personal attention of Daniel M. Goodacre, Chief Claim Examiner, Bureau of Employees' Compensation, Department of Labor, Washington 25, D. C., and mark on the envelope in the lower left hand corner: PERSONAL ATTENTION—DO NOT OPEN IN MAIL ROOM.

A copy of this letter is being mailed your attorney, Mr. David A. Fall, as well as the Commanding General, San Francisco Port of Embarkation.

Very truly yours,

[S] DANIEL M. GOODACRE

*Chief Claim Examiner*

Enclosures

cc: Mr. David A. Fall, Attorney at Law, 1008 South Pacific Avenue, San Pedro, California  
 Commanding General, San Francisco Port of Embarkation, Fort Mason, California  
 Hon. Clyde Doyle, House of Representatives, Washington, D. C.  
 Mr. H. G. Morison, Assistant Attorney General, Department of Justice, Washington 25, D. C.  
 (re: HGM-LC 61-12-29)

#### 8. ELECTION OF COMPENSATION

[Part of Respondent's Exhibit A]

U. S. DEPARTMENT OF LABOR  
 Bureau of Employees' Compensation  
 ELECTION

File No. X-400991

I, *Jesse M. Allen*, injured in the performance of duty while employed by (Establishment) *Department of the*



*Army, San Francisco Port of Embarkation, Fort Mason, California* at (Place) *A.P.O. 264 and A.P.O. 455*, on (Date) *Prior to Aug. 14, 1947*, having filed a claim pursuant to the provisions of the Federal Employees' Compensation Act, as amended (5 U.S.C. 751), on account of such injury, elect, in accordance with Section 7 of said Act to receive benefits if available under said Act, in place of any benefits (other than the proceeds of any insurance policy) under any other Act of Congress, including the Public Vessels Act, Suits in Admiralty Act, and the Federal Tort Claims Act.

[s] *Jesse M. Allen*

(Name)

JESSE M. ALLEN

*1344 Stanley Avenue*

(Street Address)

*Long Beach 4, California*

(City and State)

*July 21, 1950*

(Date)

## 9. LIBELANT'S LETTER OF OCTOBER 25, 1947

[Part of Respondent's Exhibit A]

---

Jesse M. Allen  
U.S. Marine Hospital  
Ft. Stanton, New Mexico  
October 25, 1947

Federal Security Agency  
Bureau of Employees Compensation  
285 Madison Avenue  
New York 17, New York

Gentlemen:

I have been employed by the War Department in the field with the Transportation Corp, Army Service Forces from March 25, 1944 through October 9, 1947. On October 9, 1947 I was forwarded my W.D. form C.P. 50 stating in paragraph 5, quote "Resignation" unquote, and in paragraph 13 quote "Reason: Due to ill health. (Medical certificate submitted)." unquote. On August 14, 1947 at the request of the U.S. Public Health Officer at their relief station, Honolulu, T.H. I reported to the officer in charge at the Aiea Naval Hospital, Aiea Heights, T.H. for treatment and cure of pulmonary tuberculosis as diagnosed from a routine XRay and physical examination at their relief station. On August 14, 1947 at the request of the Director of Operation, Water Division, 55th Transportation Medium Port, APO 455, I submitted a letter to the director of operation through the master of my vessel asking for a release from duty aboard the U.S. Army FS 370 as chief engineer and requested to be placed on sick leave and/or annual leave until such time as I was deemed "fit for duty" by the U.S. Public Health officers. My accrued sick leave expired on October 9, 1947 and it is apparent by this W.D. form C.P. 50 that my employment with the War Department is hereby severed. This

was not my wish as can be ascertained by the wording of my letter asking for a release from duty. However if their complement of personnel at the 55th Transportation Medium Port does not permit them to carry me on their staff this is satisfactory with me. However, I am now by the nature of this letter submitting a claim to your office for compensation commensurate with my salary, at the time of my forced resignation October 9, 1947. I am requesting this compensation in view of the extenuating circumstances, namely, I contacted this disease while I was on duty on your vessels in the South Pacific theatre, and that I was exposed to a tropical climate for over two years without a physical checkup by government physicians, and I believe I am entitled to this compensation in view of the fact that I have been paying toward retirement with civil service even though this disease is service connected.

I am trusting to a speedy reply by your office.  
I remain respectfully,

[s] JESSE M. ALLEN

Jesse M. Allen, S.S. 496-09-6176  
1344 Stanley Avenue  
Long Beach, California

#### 10. LIBELANT'S NOTICE OF CLAIM

[Part of Respondent's Exhibit A]

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#### EMPLOYEE'S NOTICE OF INJURY OR OCCUPATIONAL DISEASE

Federal Employees' Compensation Act of September  
7, 1916, as amended

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[Text of instructions omitted]

Date of this notice *29 June, 1948*

1. I hereby certify that I was employed as a *Chief Engineer of the U. S. Army F S 370* at the *55th Trans-*

*portation Medium Port, APO 455, c/o Postmaster, San Francisco, California and on Thursday, August 14, 1947, at 6 p.m. I was entered at the Aiea Naval Hospital for treatment of bilateral pulmonary tuberculosis.*

2. Cause of injury—*After being exposed to at least one known case of pulmonary tuberculosis I was sent to the South Pacific Theatre for duty that lasted two years without a physical checkup by a physician and in conditions that were a competent producing cause of tuberculosis.*
3. Nature of injury *Bilateral pulmonary tuberculosis.*
4. Names of witnesses to injury
  - Elmer W. Huggler, R D #3, Lewistown, Pennsylvania*
  - Laurence M. Lambert, 6370 Franklin Ave., Hollywood, California*
  - Lucius Keller, 1st off., F S 368, APO 455, c/o PM, San Francisco, Calif*
  - Vsevolod A. Zachary, 1461 Funston Ave., San Francisco, California*
  - Robert Moore, 1st ass't, F S 400, APO 246, c/o PM, San Francisco, Calif*
5. If this notice was not given within 48 hours after the injury, explain reason for delay and state name of person to whom notice was first given, and when. *I first informed Mr. E. M. Donnelly, Director of Operation, 55th Med. Trans. Port, of the findings of the U. S. P. H. S. doctors and showed him my X-rays. Mr. Donnelly then requested me to submit to the master of the U. S. Army F S 370, Mr. John Ulman, a letter stating my condition with a request for release for hospitalization. I submitted this letter to Mr. John Ulman on August 14, 1947.*

This injury was not caused by my willful misconduct, intention to bring about the injury or death of myself or of another, nor by my intoxication, and I hereby make claim for compensation and medical treatment to which I may be entitled by reason of the injury sustained by me.

Name *Jesse M. Allen*

Address *U. S. Marine Hospital*

*Fort Stanton, New Mexico*

C. A. 1

Revised August 1, 1945

# 11. AFFIDAVIT OF LIBELANT

[Title of Court and Cause Omitted]

STATE OF CALIFORNIA	}	ss:
COUNTY OF LOS ANGELES		

JESSE M. ALLEN, being first duly sworn, deposes and says: That he is the libelant in the above entitled action. That he was without funds with which to live upon and support his wife and was forced thereby to take the funds awarded to him under his claim for compensation under the F.E.C.A. for Tuberculosis that he suffered as the result of his employment under the contracts of employment with the United States Army Transport Service. That libelant has been unable to work since he was taken to the hospital suffering from what later was discovered to be Tuberculosis, in the Fall of 1947.

[s] JESSE M. ALLEN

Subscribed and sworn to before me  
this 26th day of February 1951.

[s] DAVID A. FALL  
*Notary Public*

12. ARMY TRANSPORTATION CORPS,  
MARINE PERSONNEL REGULATIONS

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32.1. *General.* The basic appointment of seamen, as evidenced by the WD Form 50, will generally be supplemented by an agreement evidencing the maritime rights, privileges and benefits to which seamen are entitled. Such supplemental agreements will be in the form of an Agreement of Enrollment or Individual Contract of Employment or Shipping Articles as may be authorized by the Chief of Transportation. Such supplemental agreements do not constitute the basis of employment of seamen since the basic authority for the employment of seamen is Schedule A-IV-3 of the Civil Service Rules. Seamen employed under an Agreement of Enrollment or an Individual Employment Contract will not be required to sign Shipping Articles in addition thereto. In cases where Individual Employment Contracts or Agreements of Enrollment are utilized, such agreements or contracts will be in lieu of Shipping Articles.

32.2. *Individual Employment Contracts.* Seamen who are appointed for permanent or indefinite duty overseas on vessels operated by the Transportation Corps may be required to execute individual employment contracts. The terms and conditions of such individual employment contracts will govern the conditions of employment. In such cases, the seamen will be assigned to vessels which they may be directed to deliver to their assigned post of duty by port order; copies thereof together with copies of employment contract will be placed aboard such vessels in lieu of shipping articles. One such port order may be utilized for assigning one or more than one seaman to a vessel.

32.3. *Agreements of Enrollment.* In those cases where specifically authorized by the Chief of Transpor-

tation, Agreements of Enrollment will be utilized to enroll seamen for service on vessels operated by the War Department. Where such agreements of enrollment are utilized, seamen will be assigned to vessels by means of a port order; copies thereof together with copies of agreement of enrollment will be placed aboard the vessel in lieu of shipping articles. One such port order may be utilized for one or more than one seaman for assignment purposes.

\* \* \* \* \*

### 132.5. *Application of Leave During Illness or Injury.*

If a civilian seaman sustains injury or illness, the time that he is physically incapacitated from active duty will be charged to his accumulated sick leave. If the amount of accumulated sick leave is not sufficient to cover the period of his illness or injury, annual leave will be charged against such period of incapacitation. If the combined annual and sick leave accumulated to the credit of the seaman is not sufficient to cover the period of illness, the employee may, nevertheless, continue to receive his basic wage plus maintenance during his period of illness or injury in conformity with prevailing maritime practice. In such cases, the combined accumulated sick and annual leave to the employee's credit will be charged against the equivalent period of time during which the seaman would normally receive payment in accord with the prevailing maritime practices.

132.6. *Computation of Wages.* a. The basic wages will continue payable only until the conclusion of the voyage had the seaman continued to serve upon the vessel or until he returns to the continental limits of the United States, whichever is sooner. The completion of a voyage will be the date of arrival of the vessel at the port of hire. In the event, however, the vessel stops

en route in returning at a continental port of the United States other than the home port of the vessel and is thereafter directed to proceed to a point other than the home port, the date of such direction will be deemed to be the date of the completion of the voyage.

\* \* \* \* \*

163.2. *Effect of Maintenance and Cure on Sick Leave.* a. Seamen, who, during the course of a voyage, sustain injury or illness, shall be charged sick leave for the period of time that such illness or injury continues. If the illness or injury continues beyond the expiration of his accrued sick leave, he may, in certain cases, be “advanced” sick leave not to exceed an additional 30 days. If the seaman is not eligible for advance sick leave, or if the illness or injury continues beyond such period, the accrued annual leave will be charged against such absence.

b. In any event, if the seaman’s illness or injury was not occasioned by his own delinquency or misconduct, he will be entitled to payment of his base wages until the conclusion of the voyage, had he continued to serve upon the vessel, or until he returns to the continental limits of the United States, whichever is sooner, in conformity with prevailing maritime practice. In such cases, however, all his accrued sick and annual leave will be charged against the payment of basic wages during his illness or injury.



No. 13037

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United States  
Court of Appeals  
For the Ninth Circuit.

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

VS.

ROGUE VALLEY BROADCASTING CO., INC.  
(KWIN),

Respondent.

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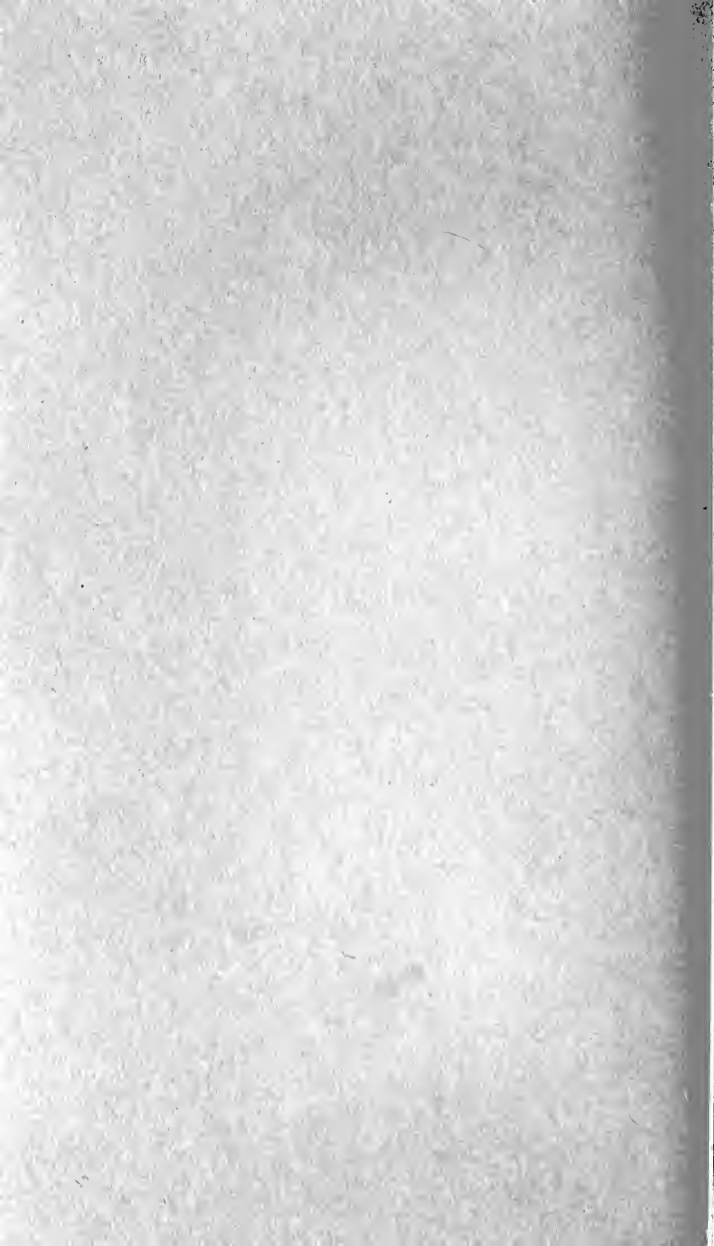
Transcript of Record

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Petition to Enforce an Order of the  
National Labor Relations Board

FILED

JAN - 1 1952



No. 13037

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United States  
Court of Appeals  
For the Ninth Circuit.

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NATIONAL LABOR RELATIONS BOARD,  
Petitioner,  
vs.

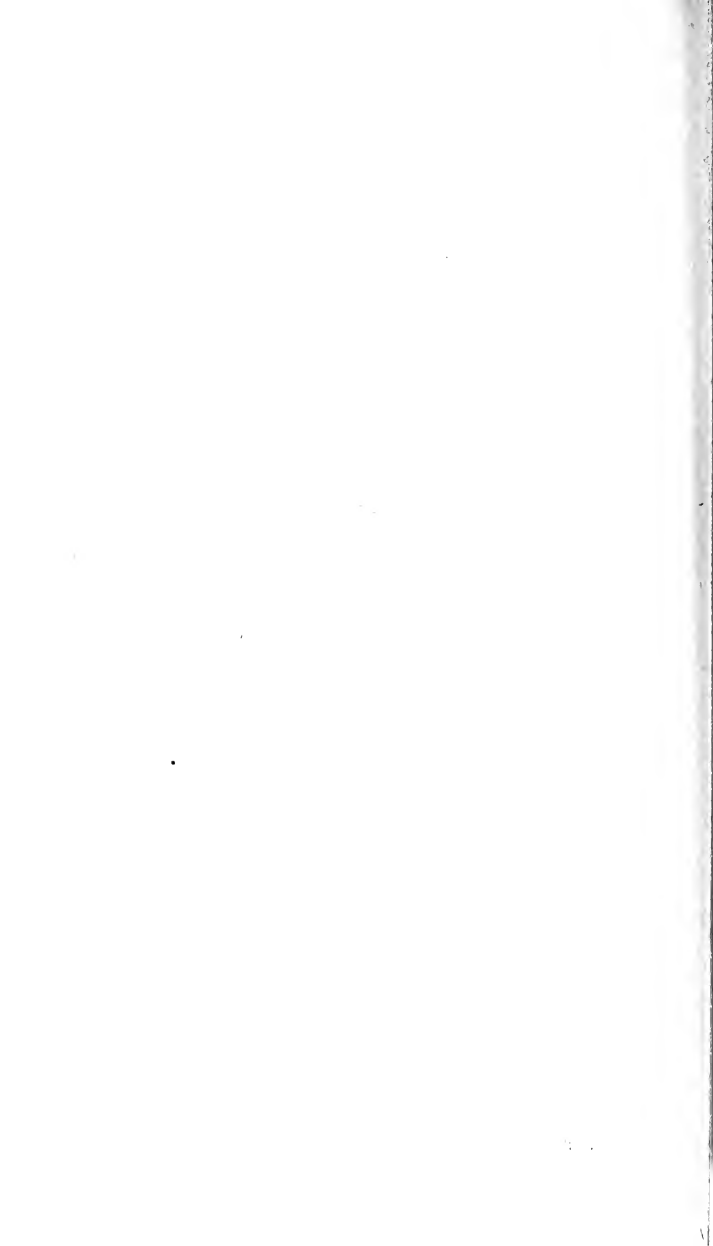
ROGUE VALLEY BROADCASTING CO., INC.  
(KWIN),  
Respondent.

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Transcript of Record

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Petition to Enforce an Order of the  
National Labor Relations Board



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

HUBERT J. MERRICK, ESQ.,

515 Smith Tower,  
Seattle, Washington,

For the National Labor Relations Board.

A. P. BLAIR,

Holland Hotel,  
Medford, Oregon,

For the Respondent, Rogue Valley Broad-  
casting Co.

R. F. RENOUD,

1417 S.W. 3rd Avenue,  
Portland, Oregon,

For Local No. 49, International Brother-  
hood of Electrical Workers.



United States of America  
Before the National Labor Relations Board  
Nineteenth Region

Case No. 36-CA-113

In the Matter of  
ROGUE VALLEY BROADCASTING CO., INC.,  
(KWIN)

and

LOCAL No. 49, INTERNATIONAL BROTHER-  
HOOD OF ELECTRICAL WORKERS, AFL

COMPLAINT

It having been charged by Local No. 49, International Brotherhood of Electrical Workers, AFL, that the Rogue Valley Broadcasting Co., Inc., operating Radio Station KWIN at Ashland, Oregon, hereinafter called the Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 61 Stat. 136, hereinafter called the Act, the General Counsel of the National Labor Relations Board, on behalf of said Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 5, as amended, Section 203.15, hereby issues this Complaint and alleges as follows:

I.

Rogue Valley Broadcasting Co., Inc., is and has been a corporation duly organized and existing by

virtue of the laws of the State of Oregon, and is and has been licensed to engage in business in the State of Oregon.

## II.

At all times mentioned herein, Respondent has been and is now operating Radio Station KWIN, the principal office and place of business of which is in Ashland, Oregon. It receives communications, intelligence and information by means of instrumentalities of interstate commerce and thereafter transmits the same as its broadcast programs. Its total annual income is about \$60,000, of which 2 per cent is derived from advertising agencies in states other than Oregon. The Company pays about \$4,000 a year to organizations located outside Oregon for the use of music, transcriptions, and recordings. The station is located about fifteen air miles from the border between Oregon and California.

## III.

Pursuant to a consent election agreement and a Board conducted election, Local No. 49, International Brotherhood of Electrical Workers, AFL, was, on September 7, 1949, certified by the Board as the exclusive representative for purposes of bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment of the employees petitioned for in 36-RC-320.

## IV.

Local No. 49, affiliated with the International Brotherhood of Electrical Workers and with the

American Federation of Labor, hereinafter called the Union, is a labor organization as defined in Section 2(5) of the Act.

V.

On or about September 2, 1949, Respondent discharged and has ever since refused to reinstate its employee, Ralph S. Click, because of his membership in and activities on behalf of the Union.

VI.

By the acts and conduct described in the foregoing paragraph, and by interrogating its employees concerning their purposes and activities in advocating, supporting, and joining the Union; by cautioning said employees against engaging in such activity; by the act described in Paragraph V, above, and by other and similar acts and conduct, Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

VII.

By the acts described in Paragraph V, Respondent has discriminated and is discriminating in regard to the hire and tenure of employment, and has discouraged and is discouraging membership in the Union, and thereby has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a)(3) of the Act.

VIII.

By the acts and conduct described in Paragraphs

V and VI, Respondent has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

### IX.

The acts and conduct described in Paragraphs V and VI, occurring in connection with its operations described in Paragraphs I and II, have a close, intimate, and substantial relation to trade, traffic, and commerce in the several states of the United States, and tend to lead to labor disputes which burden and obstruct the free flow of commerce.

### X.

The acts and conduct of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Nineteenth Region, issues this Complaint against Rogue Valley Broadcasting Co., Inc., (KWIN), Respondent herein.

Dated June 6, 1950.

[Seal]     /s/ THOMAS P. GRAHAM, JR.,  
Regional Director, National Labor Relations Board,  
19th Region.

[Admitted in evidence as General Counsel's Exhibit No. 1-D.]

[Title of Board and Cause.]

ANSWER TO COMPLAINT AND  
MOTION FOR DISMISSAL

Comment

That the position of the Chief Engineer at Station KWIN at Ashland, Oregon, was and is now a supervisory post within the meaning of Sec. 3(11) of the National Labor Relations Act as amended by the Taft-Hartley Act of 1947.

That the said Ralph Click was a supervisor within the meaning and intent of the law now in effect and that included in his duties as supervising engineer for Station KWIN, named in this complaint, was the right to hire and fire as well as the right to recommend for hiring and firing and having general supervision over the duties of three engineer-announcers of the Station.

That on December 31, 1947, the said Ralph Click did actually use his authority to fire Marion B. Maston and his right to hire or fire in the absence of the station manager had never been rescinded.

That except for the fact that the supervising engineers do work occasionally with the tools and do stand watch at the smaller stations, they would not be entitled to membership in the Union and further that any and all actions of such supervisors could and would be found to be acts of Management if they had attempted to coerce or intimidate employees in their rights to join or not join a Union.

Further, that except for the Bargaining Election in this case being held on a consent basis along with two other Radio Stations in this vicinity, this question of supervisors might have been determined, previous to this date.

### Motion

Inasmuch as the Employer in this case was only exercising his prerogative in making changes in the supervisory staff of Radio Station KWIN, as might regularly be the case in any business institution, among management personnel, we believe this matter is beyond the jurisdiction of the Labor-Management Act of 1947,

Therefore, we must ask that the Complaint in this case be dismissed on the ground that the man in question is a supervisor within the meaning of the act and therefore outside the jurisdiction of the National Labor Relations Board.

June 15, 1950.

Respectfully submitted,

/s/ ALFRED P. BLAIR,

Representing Industry Council of Medford, Oregon,  
and Radio Station KWIN, one of its Members.

[Admitted as General Counsel's Exhibit No. 1-F.]



[Title of Board and Cause.]

## INTERMEDIATE REPORT

### Statement of the Case

Upon charges duly filed by Local No. 49, International Brotherhood of Electrical Workers, AFL, herein called the Union, the General Counsel of the National Labor Relations Board,<sup>1</sup> by the Regional Director of the Nineteenth Region (Seattle, Washington),<sup>2</sup> issued a complaint dated June 6, 1950, against Rogue Valley Broadcasting Co., Inc., (KWIN), Ashland, Oregon, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the charges, complaint, and notice of hearing were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that the Respondent: (1) On or about September 2, 1949, discriminatorily discharged and thereafter refused to reinstate Ralph S. Click, because of his membership in and activities on behalf of the Union, and (2) interrogated its employees concerning their purposes and

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<sup>1</sup>The General Counsel and his representative at the hearing are referred to as the General Counsel. The National Labor Relations Board is herein called the Board.

activities in advocating, supporting, and joining the Union, cautioned its employees against engaging in such activity, and by these and other similar acts and conduct interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act. The complaint alleged that by the foregoing conduct the Respondent engaged in violations of Section 8 (a) (1) and (3) of the Act.

Thereafter, the Respondent filed an answer and motion to dismiss. The answer, further elaborated at the outset of the hearing, denied that the Respondent had engaged in any unfair labor practices alleged in the complaint and affirmatively alleged that Click was a supervisor. The Respondent accordingly moved that the complaint be dismissed.

Pursuant to notice, a hearing was held on August 22, 1950, at Medford, Oregon, before Frederic B. Parkes, II, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Respondent were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the outset of the hearing, the Respondent filed another motion to dismiss on the ground that the Respondent was not subject to the Board's jurisdiction. This motion and that contained in the Respondent's answer were denied without prejudice to their subsequent renewal. At the conclusion of the hearing, the undersigned granted a motion by the General

Counsel to conform the pleadings to the proof as to dates, spelling, and minor variances. Ruling was reserved upon the Respondent's motion to dismiss the complaint's allegations that the Respondent had engaged in violations of Section 8 (a) (1) of the Act. The motion is disposed of in accordance with the findings of fact and conclusions of law hereinafter made.

Upon the conclusion of the hearing, the undersigned advised the parties that they might argue before, and file briefs or proposed findings of fact and conclusions of law, or both, with the Trial Examiner. The parties waived oral argument. Thereafter, the Respondent and the General Counsel each filed a brief with the undersigned.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

### Findings of Fact

#### I. The Business of the Respondent

Rogue Valley Broadcasting Co., Inc., an Oregon corporation, with its principal office and place of business at Ashland, Oregon, is engaged in the operation of Radio Station KWIN. The Respondent's station is at Ashland, Oregon, 15 miles from the California border. In the operation of its radio station, the Respondent receives communications, intelligence, and information by means of instrumentalities of interstate commerce and thereafter transmits the same as its broadcast program. The

Respondent broadcasts radio signals in interstate commerce and uses the facilities of the Pacific Telegraph and Telephone Corporation in broadcasting. Two programs, amounting to a total broadcast time of 30 minutes a day, 6 days a week, originate in Los Angeles, California. The cost for these programs paid to organizations located outside the State of Oregon, is \$2,500 annually. Approximately 3 to 3½ per cent of the Respondent's broadcasts are remote broadcasts, utilizing lines of telephone companies. The annual purchases of the Respondent total approximately \$5,000. Its total sales of advertising range between \$50,000 and \$60,000 a year. Most of the Respondent's sales of advertising is to local concerns; more than 50 per cent of such advertisements are for goods manufactured outside the State of Oregon. The Respondent operates under a license and regulations of the Federal Communications Commission. A monthly frequency check is made with a station at Point Reyes, California. Upon the basis of the foregoing, the undersigned finds, contrary to the Respondent's contentions, that the Respondent is engaged in commerce within the meaning of the Act.<sup>2</sup>

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<sup>2</sup>W.B.S.R., Inc., 91 N.L.R.B. No. 110. See also Veterans' Broadcasting Company Radio Station KNUZ, 87 N.L.R.B. No. 33; Joe V. Williams, Jr., et al., 85 N.L.R.B. 752; Nebraska Broadcasting Company, Inc., 85 N.L.R.B. 694; Central Broadcasting Co., 81 N.L.R.B. 422; Western Gateway Broadcasting Corporation, 77 N.L.R.B. 49.

## II. The organization involved

Local No. 49, International Brotherhood of Electrical Workers is a labor organization affiliated with the American Federation of Labor, admitting employees of the Respondent to membership.

## III. The unfair labor practices

### A. The supervisory status of Ralph S. Click

Before detailing the course of events which lead to the discharge of Click, it will be helpful at the outset to consider the Respondent's affirmative defense in respect to the termination of Click's employment; namely, that Click was a supervisor and accordingly that his discharge was not violative of the Act.

Exclusive of the station manager, admittedly a supervisory employee, the Respondent employed nine employees in four departments, as follows:

1. The engineering and announcing department employed Ralph Click, Charles Fields, Philip George, and Donald Smith, who held licenses as radio engineers from the Federal Communications Commission, hereinafter called the F.C.C. Click's position was termed chief engineer.

2. The program department consisted of one full-time employee, Don Berg, and Charles Fields who worked part of the time in the department as its program director, as well as serving as an announcer and engineer as above mentioned.

3. The commercial department embraced three employees.

4. The "front office" was comprised of one employee who served as a receptionist and stenographer.

As chief engineer, the primary responsibility of Click was the maintenance and operation of the station's equipment. Like the three other employees of the engineering and announcing department, he worked as an announcer and engineer-operator on a regular shift. He instructed employees in their duties and in their operation of the equipment and directed repairs to the equipment, performing physical labor himself in such maintenance.

Click made out work schedules for the employees in the engineering and announcing department, but before the schedules became effective they were subject to the approval of the station's manager, Edward P. Barnett. Click had no authority to authorize employees to work overtime without first obtaining the approval of Barnett. Although Click was authorized to make purchases of minor maintenance supplies, such as tube replacements, he had to obtain the approval of Barnett for major purchases.

Click received the same salary as Charles Fields, a nonsupervisory employee of the engineering and announcing department, and their salaries were between \$30 and \$50 more than the other two employees of the department. According to Click's credible and undenied testimony, he did not know

the amount of the salaries of the other employees of the department and had no authority to give such employees pay increases.

Applicants for positions were interviewed by Barnett and not by Click. Although on occasion Barnett sought Click's opinion in regard to applicants for positions, Barnett did not effectuate Click's suggestions in these matters. On one occasion, Click recommended that Barnett discharge an employee; and on another, he protested the hiring of an applicant. His recommendations were not followed.<sup>3</sup>

In Barnett's absence, his duties were assumed by Lane Bardeen, commercial manager of the station. In December, 1947, in the absence of Barnett's predecessor as station manager, Click discharged an announcer-engineer who appeared for work in a state of intoxication. At that time, it appears that in the absence of the station manager or in emergency situations, Click had authority to hire and discharge employees. Barnett denied that such authority had been revoked. Click testified, however, that he did not have the same authority after Barnett became station manager, that when Barnett left on a trip shortly after becoming manager, he informed Click "that Mr. Bardeen was in charge of the station," and that shortly after Barnett became

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<sup>3</sup>These findings are based upon the credible testimony of Click. For the reasons hereinafter indicated, Barnett's testimony that Click had the authority to recommend the hiring of employees and that "The occasion never came up when his recommendation was different than mine" is not credited.

manager, Click told him that he was going to discharge an employee who in Click's opinion was unsatisfactory, but Barnett replied that "he would do all the hiring and firing at the station" and declined to discharge the employee.

Click's testimony was, in effect, corroborated by the position taken by Barnett at a conference with Roy F. Renoud, business representative of the Union, and a field examiner of the Board on August 29, 1949, prior to the conduct of a consent election. During the conference, the field examiner inquired as to the Respondent's position as to the supervisory status of Click. Barnett replied that "Click's position as chief engineer, in compliance with Federal Communications regulations was to see that the equipment was maintained. He had no power to do anything else as laid out by the Act as a supervisory employee" and that Click should vote in the election.<sup>4</sup> His ballot was not challenged.

Upon the entire record and his observation of the witnesses, the undersigned credits the testimony of Click and finds Barnett's testimony unworthy of credence. The undersigned further finds that Click was not a supervisory employee within the meaning of the Act<sup>5</sup> and that the record supports the following description made by Click of his job:

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<sup>4</sup>The findings as to the preelection conference are based upon the credible and uncontroverted testimony of Renoud.

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<sup>5</sup>Louis G. Baltimore, 57 N.L.R.B. 1611; Radionic Transformer Company Not. Inc., 70 N.L.R.B. 1186; Radio Station KTBS, Inc., et al., 90 N.L.R.B. No. 218.



“\* \* \* at a large station like KNX in Los Angeles, for example, the chief engineer is the next man to manager. In a small station, like KWIN, the chief engineer is merely a glorified mechanic. I mean by that, he’s really the chief technician. The term engineer is a misnomer.”

B. Advent of the Union; interference, restraint, and coercion

In July, 1949, employees of a radio station in Medford, Oregon, expressed an interest in self-organization to Roy F. Renoud, business agent of the Union, and Renoud came to Medford to consult with them. The latter also made arrangements for Renoud to meet employees Click and Fields of the Respondent’s station. After discussing the Union with Renoud, the same evening Click and Fields signed authorization cards and applications for membership in the Union. Renoud gave them two application cards in the event the other two announcer-engineers of the Respondent’s station desired to join the Union. Click subsequently succeeded in enlisting the membership of employee Smith in the Union and mailed his application for membership to Renoud.

Upon receipt of Smith’s application, Renoud sent the following letter to the Respondent on July 25, 1949:

This is to advise you that Local 49, International Brotherhood of Electrical Workers, represents a majority of your employees and we are filing as of this date with the National

Labor Relations Board a petition asking for recognition, as directed by Section 9 (c) (1) of the Labor Management Act of 1947.

We would like to know your position in regards to recognizing Local 49 of the I.B.E.W. as the collective bargaining agency for all of your broadcast technicians and announcers employed in your station. Any discharges or attempts to coerce or intimidated (sic) will be viewed as an unfair labor act and such steps will be taken as directed by the Labor Management Act of 1947. \* \* \*

The day Barnett received the above-quoted letter from Renoud, Barnett summoned Click to Barnett's office, and, according to the credible testimony of Click, the following conversation ensued:

"[Barnett] asked me first what I thought about this union deal, and I told him I thought it would be a good thing for the employees, and he said that anyone 'who is not satisfied here, can quit. We don't want any damned union around here. They leave a very bad taste in my mouth, and it would if you joined the union behind my back.' This continued for some time, very repetitious. Obviously, the man didn't like the idea of our joining the union. I told him that the union had made no demands on him and I didn't intend to make any demands on the station. I also suggested they wait until demands were made before he started

jumping too far to conclusions. \* \* \* He said it left a very bad taste in his mouth. He repeated that a number of times and finally he said he wouldn't rest until it died."

About August 19, 1949, Manager Barnett asked employee Fields what the latter "thought about the union." When Fields stated he was in favor of the Union, Barnett said that "he hoped that [Fields would] keep [his] views with the station and their ideas."

About the same time, or a few days later, Barnett asked employee Donald E. Smith what the latter "thought of the union" and how he would benefit by being a member of the Union. Barnett further stated that "he didn't feel the station could afford another pay raise at that time" and that Smith would have to make up his "own mind as far as the union vote was concerned."

Shortly thereafter, Barnett brought a letter to Smith from the Respondent's counsel. The latter advised the employees, according to Smith, that "if we [joined the Union] it would be turning our powers to bargain over to the Portland local and we wouldn't have any say in the union at all. The people up there would make the laws and we would have to abide by them." During this conversation, Barnett told Smith that if the latter "voted against the union [he] wouldn't have anything to fear from Mr. Click because he wouldn't be there."

About the same time, Barnett inquired of em-

ployee Philip R. George as to his sentiments in regard to the Union.<sup>6</sup>

On August 29, 1949, pursuant to the terms of a consent-election agreement, the Board conducted an election among the employees of the engineering and announcing department to determine whether they desired to be represented by the Union for the purposes of collective bargaining. The Union won the election, and on September 7, 1949, was certified as the statutory representative of the employees of the engineering and announcing department.

Upon the entire record, the undersigned concludes and finds that by (1) Barnett's inquiries of the employees in regard to their sentiments as to the

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<sup>6</sup>The findings in this and the preceding four paragraphs are based upon the credible testimony of Click, Fields, Smith, and George. Their testimony was not specifically denied by Barnett. The latter admitted that he inquired of the employees in regard to their views as to the Union and informed them that the Respondent could not afford to grant them a wage increase. Barnett testified that he informed the employees that these opinions were his own, that "their opinion was as good as" his, and that he "made it very clear that [he] wasn't interested in how their vote was coming out. That was up to them, one thing that should be decided in their own minds." He denied generally that he attempted to intimidate any employees in connection with the consent election. Upon the entire record and his observation of the witnesses, the undersigned credits the testimony of Click, Fields, Smith, and George and finds Barnett's testimony unworthy of credence to the extent that it is at variance with the testimony of the witnesses found to be reliable.

Union and in respect to the benefits which they hoped would ensue from affiliation with the Union, (2) his announcement to employee Smith, following such inquiries, that the Respondent could not grant an increase in pay at that time, (3) his statement to Click after such inquiries that dissatisfied employees "can quit. We don't want any damned union around here" and that the union activities of the Respondent's employees "left a very bad taste in his mouth \* \* \* he wouldn't rest until it died," and (4) his observation to employee Smith that if the latter "voted against the union [he] wouldn't have anything to fear from Mr. Click because he wouldn't be there," the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 8 (a) (1) of the Act.

#### C. The discriminatory discharge of Ralph Click

##### 1. Sequence of events

Click, who had many years of varied experience in the radio engineering field, entered the Respondent's employ on February 4, 1947, as an announcer-engineer, when he was hired by Robert Reinholdt, who at that time was manager of the Respondent's radio station, to assist in the rebuilding of the station following a disastrous fire of the preceding December. On March 9, 1947, the station resumed operation. In August, 1947, Click became chief engineer. In September, 1948, Reinholdt left the Respondent's employ and Barnett succeeded him

as station manager. Click continued as chief engineer after the change in managers.

As noted above, Click and employee Fields launched the Union's organizational campaign among the Respondent's employees and Click enlisted the membership of another employee in the Union and solicited the membership of two other employees. As heretofore found, Manager Barnett interrogated Click in regard to his union activities and sympathies and told him that dissatisfied employees could quit, that "we don't want any damned union around here. They leave a very bad taste in my mouth, and it would if you joined the union behind my back," and that the Union "left a very bad taste in his mouth \* \* \* he wouldn't rest until it died."

The Union won the consent election held on August 29, 1949. On September 2, 1949, Click was summoned to Barnett's office and was summarily discharged without prior warning. When Click inquired as to the reasons for his dismissal from the Respondent's employ, Barnett informed him that he was inefficient, uncooperative, incompetent, unqualified, and dishonest, that he was a trouble maker and had caused dissension among the employees, keeping them in such a state of turmoil that they were unable to do their work, that Click had talked to members of the Board of Directors "behind [Barnett's] back," and that Click had sought employment elsewhere.<sup>7</sup> Barnett requested

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<sup>7</sup>The findings in this sentence are a synthesis of the mutually reconcilable testimony of Click and Barnett.

that Click obtain his tools and leave the station within 20 minutes. Click testified credibly and without contradiction that Barnett then "ran into the control room, grabbed my license off the wall before I was able to get to it, took it into the office and was in such a haste he couldn't wait to take the padding off the back to get at my license that he took a knife and cut it out" of its frame. On the back of the license, which had been issued to Click by the F.C.C., Barnett wrote the word, "unsatisfactory," in the space allotted to indicate the radio station's endorsement as to the services of the license holder.<sup>8</sup>

2. Reasons for Click's discharge advanced  
by the Respondent prior to the hearing

Immediately after his discharge, Click informed Business Agent Renoud that the Respondent had terminated Click's employment. A few days later, Renoud telephoned Manager Barnett, protested Click's discharge, requested his reinstatement, and asked for a statement of the basis for the discharge. According to the credible and uncontroverted testimony of Renoud, Barnett informed him that the reason for Click's discharge "was that he created dissension among the men and that he had not maintained the equipment properly." No mention

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<sup>8</sup>Barnett admitted that the effect of such an endorsement was that Click "cannot become employed by another radio station unless they want to overlook the fact or didn't realize they were getting an unsatisfactory man."

of specific instances of such conduct on the part of Click was given and nothing was said by Barnett in respect to Click's alleged willful neglect of duties.

The record shows that in response to an inquiry by the F.C.C. in regard to the endorsement of unsatisfactory on Click's license, the Respondent gave the following reasons for such endorsement:

1. During the months of May and June, 1949, a Mr. Wallace C. Clark was employed at KWIN as a "man on the street" reporter. Mr. Clark used a wire recorder to record a daily program from the streets of the business district. For some unknown reason Mr. Click disliked Mr. Clark. As Chief Technician for KWIN it was the duty of Mr. Click to properly maintain the equipment used by Mr. Clark on his program. Nevertheless the equipment was constantly out of order in some fashion. Either the recorder itself was not in good operating condition or the wire cartridges used were being broken. Naturally Mr. Click blamed Mr. Clark for the trouble and constantly recommended that the man be discharged. It is true Mr. Clark was no technician, however he was fully capable of operating a wire recorder. Mr. Click admittedly disliked the man and stated to the management he would not cooperate in the maintenance of the equipment used by Mr. Clark.

2. On July 15th and 16th, 1949, KWIN did



a remote broadcast of the annual local rodeo. For the broadcast we were using two microphones. One was placed in the broadcast booth where the remote console and the Chief Engineer would also operate. The other microphone was placed about a hundred yards away to be near the judges' stand. There was a sportscaster at each mike. Mr. Click was engineering from the console in the booth. Sportscaster Ned Liebman was the man at the mike near the judges' stand. A few days prior to this Mr. Click had taken a dislike to Mr. Liebman because of some difference of opinion and had complained to the management about having the man in the employ. During the broadcast from the rodeo most of the action was to be described from the judges by Mr. Liebman, yet the broadcast from that point was practically lost because of poor control by the engineer. Mr. Click was perfectly capable of proper operation from the control booth yet during the times when Mr. Liebman was announcing the proper gain was ignored.

In a letter, dated November 10, 1949, to a field examiner of the Board, Barnett ascribed as the reasons for Click's discharge "incompetency and willful neglect of duty."

### 3. Respondent's position as to Click's discharge at the hearing

In respect to the background leading to Click's

discharge, Manager Barnett gave the following testimony:

“Well, I had been rather dissatisfied with the services of Click and his general attitude toward the station since I became manager. \* \* \* However, even though I felt as though he was not the man that I myself would have hired originally, nevertheless I would not discharge a man unless there were specific reasons for discharge, but at the same time I would be watching rather closely to make sure that his operation was the type of operation that I wanted at the station. So, there were many things, such as personality differences and dissension in the station that was overlooked for a long time by myself, overlooked as far as the discharging of a man for it, but not overlooked in my own mind, as far as what my own opinion of the man and the discharge of his duties were.”

The specific incidents which were the reasons for Click's discharge were as follows, according to Barnett's testimony:

1. As referred to above in the reasons given the F.C.C. for the endorsement of unsatisfactory on Click's license, the initial incident occurred in May and June, 1949, in regard to the broadcast of a “man on the street” program by Wallace C. Clark. He used a wire recorder to record his interviews with people on the streets of the business district. During this period, an inordinate number of wire

cartridges in the equipment used by Clark was broken and Barnett lay the blame for such breakage to Click because "it was the job of the chief engineer to keep the equipment in good repair." However, Barnett admitted that he made no investigation to determine the cause of or the responsibility for the breakage of the cartridges.

2. Shortly after Barnett became manager, he made arrangements with a gasoline station so that Click might charge to the Respondent's account purchases of gasoline and oil used by Click in driving his personal car on business of the Respondent. About June, 1949, Barnett received a monthly statement for these purchases and noted that Click's purchases reached a rather large total. He summoned Click and inquired as to the nature and amount of the purchases. Click frankly admitted that some of his purchases of gasoline was for his personal use and stated that he had made these purchases because he believed that he was entitled to some reimbursement for gasoline and oil which he had used on the Respondent's business before Barnett became manager and instituted these credit arrangements. Barnett reprimanded him and then, according to Barnett's testimony, "dismissed him from the office at that time and let it go at that because, while actually I should have discharged him on the spot right at that time, I still thought, well, I'll think it over and see what kind of action I should take."

About June 23, 1949, Wallace Clark complained

to Barnett that the night previous, Click had ordered Clark from the station after 11 p.m., the hour the station ceased broadcasting. Clark inquired whether he might remain in the station and work after the closing hour. Barnett replied that Clark might do so. When Barnett questioned Click about the matter, Click stated that it had been a policy that "nobody of the station staff works after eleven o'clock." Barnett replied, "I don't believe you're correct in that assumption because anybody on the station staff, as long as they have work to do, anybody can work after eleven o'clock at night even though we go off the air at eleven o'clock." Click became angry and retorted, "From this date on, I'll never be responsible for the technical equipment of this station as long as that policy lasts." Barnett further testified that on the next day, June 24, 1949, "I decided I was going to discharge Ralph [Click] on \* \* \* the following Monday," June 27, 1949.

On June 24, 1949, Barnett, according to his testimony, informed Mark S. Hamaker, president of the Respondent, of the decision to discharge Click.<sup>9</sup> However, on June 26, 1949, Click became ill and underwent an emergency appendectomy operation. In view of this circumstance, Barnett was not disposed on June 27, 1949, to "discharge a man who was in the hospital" and determined "to wait until the man was out of the hospital and back on his feet" before discharging him. According to Bar-

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<sup>9</sup>Hamaker's testimony corroborated that of Barnett on this conversation.

nett, he "intended to wait approximately thirty days, or whatever time it was that Click felt better. The exact date wasn't set after the one postponement on that particular Monday."

About a week later, Click returned to work. Shortly thereafter, according to Barnett, Hamaker stated that he had heard Click broadcasting on the Respondent's station and inquired as to the reason he was still in the Respondent's employ in view of Barnett's previously expressed intention of discharging Click. Barnett explained that Click had been ill and that his discharge had been postponed.<sup>10</sup>

Barnett gave the following explanation for his failure to effectuate the discharge of Click in July, based upon the above incidents occurring in May and June:

"And then the latter part of July, I received the notice from the I.B.E.W. that the employees—that they had—I guess they were signature cards that the employees had signed and that there would be an election held at the station later, and that any attempts to discharge a man would be held as an unfair labor practice, or words to that effect. \* \* \* So, when I received that, the first thing I thought of was the fact that, well, I guess that ties my hands and I can't replace my chief engineer now. \* \* \* I went to Mr. Hamaker, the President of the Corporation, and he recommended that

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<sup>10</sup>Hamaker's testimony corroborated that of Barnett on this conversation.

I get in touch with the Industry Council, Mr. Pat Blair, and talk the situation over with him. \* \* \* And I immediately told Mr. Blair of the situation, and the first thing I asked him was 'What shall I do in the case of our chief engineer?' And he said, 'Well,' he said not to discharge the man until after the election had been held, make sure it's a fair election, and 'After the election is held, why, as long as you have cause to discharge a man, why, then the man can be discharged.'" So, the election, it went through, and the election was held, and I discharged the man on the 2nd of September."

In view of Barnett's testimony that he determined to discharge Click the latter part of June, 1949, it would appear that the rodeo broadcast of July 15th and 16th, 1949, referred to as one of the reasons set forth above for the endorsement of unsatisfactory on Click's F.C.C. license, was not a significant factor in the incidents leading to Click's discharge. In respect to this matter, Barnett testified that his observation that the broadcast "was practically lost because of poor control by the engineer," namely, Click, was based upon Barnett's listening to the broadcast. He admitted, however, that he never discussed the matter with Click or with the announcers, Liebman and Seely.

4. Other evidence in respect to the above incidents; conclusions

Having set forth a summary of the evidence adduced by the Respondent in support of its contention that the discharge of Click was not violative of the Act but was made for proper cause, there remains for consideration other evidence in respect to these incidents and a resolution of the resulting conflicts in the evidence.

The testimony of employees Click, Smith, Fields, and Seely, who impressed the undersigned as reliable witnesses worthy of credence, establishes that the quality of Clark's on-the-street broadcasts was poor and that during the 3½-month period of his employ by the Respondent, an excessive amount of wire cartridges on the recorder operated by him was broken. Although Click had given Clark instructions in the proper operation of the wire recorder, it is clear that Clark did not follow such instructions and that the breakage of the wire cartridges was due to his improper operation of the recorder. The undersigned credits the testimony of these employees and in view of these findings, as well as the fact that Barnett admitted that he made no investigation to determine the cause for the breakage of wire cartridges, it is found that such breakage was due to Clark's inefficient operation of the equipment and that Barnett's reliance upon this incident as a reason both for the discharge of Click and for the endorsement of unsatisfactory on his license was without basis of fact.

As to the use of the gasoline credit card by Click

for his personal use, his testimony in regard to the incident was substantially in accord with Barnett's version set forth above. Barnett's testimony in regard to this incident is accepted as summarized above. It is noteworthy that following their discussion the matter "dropped" and Barnett "let it go at that."

In respect to the incident on June 23, 1949, when Click expelled Clark from the station after closing hours, Click's version, as follows, was considerably different from that of Barnett. After the station was rebuilt after the fire, a policy was established that no one would be permitted access to the building after closing hours but the manager, chief engineer, and watchman.<sup>11</sup> Employee George and watchman William Sellens had reported to Click that Clark had been in the station after closing hours and had attempted "to turn on some of the equipment after hours after we had left."<sup>12</sup> This action was in violation of the regulations of the F.C.C. One night after closing hours in late June,

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<sup>11</sup>Watchman William Sellens testified that such was the rule and that he had been informed of the rule by former manager Reinholdt. Click testified that President Hamaker instituted the rule. The latter denied that he had been responsible for such a rule. For the purpose of this Report, it is unnecessary to resolve this conflict in evidence as to the identity of the person promulgating the rule. The testimony of Click and Sellens in respect to the existence of the rule is credited.

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<sup>12</sup>Sellens corroborated Click's testimony in this regard. Sellens also testified that he requested Clark to leave the station on this occasion.



1949, Click found Clark in the station and asked him to leave. The next day Barnett inquired of Click as to the reason he had expelled Clark from the station and Click replied that so far as he knew the rule that no employees but the manager, chief engineer, and watchman were to be allowed in the station after hours had not been rescinded and that he had had reports that Clark had attempted to turn on equipment after hours. Apparently, Barnett stated that Clark should be permitted access to the building after closing hours for Click admitted that he told Barnett that he would not be responsible as chief engineer for the technical equipment in the station if employees were allowed to remain after closing hours. Upon the entire record and his observation of the witnesses, the undersigned credits the testimony of Click, as corroborated by Sellens, in respect to this event and does not credit Barnett's version to the extent that it was at variance with that of Click.

In respect to the rodeo broadcasts of July 15 and 16, referred to in the Respondent's reply to the F.C.C.'s inquiry as to the endorsement of unsatisfactory on Click's license, employee Fields testified that he heard the broadcast and had no criticism to make of them and that the voice level of the announcers was the same. Liebman, according to Smith, had a tendency to wander from the microphone and to speak softly, thereby giving difficulty to the engineer in controlling the voice level. George testified that he heard no comments by

Barnett in regard to the rodeo broadcasts. Click testified that he had heard no criticism of these broadcasts. In view of the testimony of these witnesses, who impressed the undersigned as reliable and truthful, as well as Barnett's admitted failure to discuss the broadcasts with Click or the announcers, it is found that Barnett's testimony in regard to this event and his statement to the F.C.C. ascribing the rodeo broadcasts as a reason for the endorsement of unsatisfactory on Click's license, had no basis in fact. Barnett is not credited on this issue.

In conclusion, it is thus clear that the facts do not support two of the four reasons advanced, at various times, by the Respondent as the basis for its discharge of Click. That is, the breakage of wire cartridges in May and June, 1949, was due to the inefficiency and inaptitude of Clark and not Click and the rodeo broadcasts of July 15 and 16, 1949, were not "lost because of poor control" by Click. As to the third reason, the expulsion of Clark from the station after closing hours in June, 1949, Click's version of the incident has been credited and it has been found that his expulsion of Clark was based upon a rule, in existence since March, 1947, which prohibited access to the station after hours to all persons except the manager, chief engineer, and watchman. At the conclusion of Click's discussion of the incident and rule with Barnett when the latter stated that Clark should be permitted to remain after closing hours, Click stated that as chief engineer he would not be responsible for equipment in the station if employees

were allowed access to the station after hours. The Respondent argues that the position taken by Click in the matter constituted a willful neglect of duties inasmuch as one of his principal duties and responsibilities was for the condition of the station's equipment. The Respondent's argument is clearly without merit. In the undersigned's opinion, Click's statement was made (1) to support his advocacy of the theretofore existing rule forbidding employees access to the station after hours and (2) to absolve himself of any responsibility for damage to equipment or the station or for infraction of regulations of the F.C.C. resulting from the presence of employees in the station after hours and in the absence of Click. The fact that Click sought to define his responsibility for equipment of the station and for the station's observance of F.C.C.'s regulations to a period when the station was in operation cannot be said to be unreasonable or to be a willful neglect of duty on his part.

The remaining reason urged by the Respondent for Click's discharge involved his unauthorized use of a gasoline credit card for his personal use in June, 1949. Since both Barnett and Click both regarded the incident at an end following the former's discussion with and criticism of the latter, it seems improbable that this incident, occurring in June, was the motivating factor in the discharge of Click over 2 months later, in September. (The same improbability extends to the other reasons urged by the Respondent but rejected by the under-

signed as being without merit.) Barnett's somewhat ingenious, but unconvincing, attempt to relate Click's discharge in September to incidents occurring in June and to justify the more than 2 months' delay in making the discharge necessarily falls when considered in the light of another contention of the Respondent, namely, that Click was a supervisor. Thus, Barnett insisted that he determined to discharge Click late in June, to be effective on Monday, June 27, 1949. However, Click's sudden illness and operation on June 26 impelled Barnett to postpone the termination of Click's employment until such time as Click had recovered his health. Late in July, by which time Click had recuperated, the Union requested that the Respondent grant it recognition and warned the Respondent that "any discharges or attempts to coerce or intimidate will be viewed as an unfair labor act and such steps will be taken as directed by the Labor Management Act of 1947." According to Barnett, he was advised to delay the discharge of Click further until after the representation issue had been settled by an election. Consequently, on September 2, 1949, 4 days after the consent election, Barnett at last effected the release of Click from the Respondent's employ. Barnett's alleged reluctance to discharge Click during the pendency of the representation issue is not compatible with the Respondent's position that Click was a supervisor and that his discharge was not violative of the Act. If indeed the Respondent believed Click to be a supervisor

and, in fact, had cause to discharge him, it seems highly improbable that it would have postponed his discharge more than 2 months, pending the resolution of the representation question, since the discharge of a supervisor would not be violative of the Act or concern the representation issue. In view of this circumstance, as well as his impression of the witnesses, the undersigned does not credit Barnett's explanation for the delay in making the discharge of Click.<sup>13</sup>

That the reasons advanced for Click's discharge were mere pretexts to cover its illegal motivation is clear in view of the more than 2 months' interval existing between the incidents relied upon and Click's ultimate discharge in September, and also of the shifting reasons for the discharge advanced by the Respondent from time to time. Thus, in answer to the F.C.C.'s inquiry in regard to the endorsement of unsatisfactory on Click's license, the Respondent replied that the endorsement was based upon the incident involving Clark and the breakage of wire cartridges in May and June, 1949, and upon the rodeo broadcasts of July 15 and 16, 1949. Yet, at the hearing, Barnett testified that the reasons for Click's discharge encompassed the wire-cartridge incident, the unauthorized use of the gasoline credit card for personal use, and the expulsion of Clark from the station after hours in

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<sup>13</sup>The same considerations impel the rejection of Hamaker's testimony elicited in corroboration of that of Barnett.

June, 1949. Barnett further testified that he determined to discharge Click on June 24, 1949, the day after their discussion about the latter incident, and obviously several weeks prior to the rodeo broadcasts on July 15 and 16. In addition, there was variance in the reasons advanced by Barnett to the Board and to the Union's business agent. Also, it is significant that Click was discharged without prior warning and that the reasons given him for his discharge were in general terms.

However, it seems clear that contained in those general reasons given Click and also Renoud was the motivating one which impelled the Respondent to terminate Click's employment; namely that he was a trouble maker and had caused dissension among the employees. The record amply supports the inference, which the undersigned makes, that Barnett's characterization of Click as a trouble maker and creator of dissension among the employees was based upon Click's union activities and membership, which were known to the Respondent in view of the small size of the station and Barnett's prompt interrogation of the employees after they evidenced interest in self-organization. Click was one of the two employees responsible for the self-organization of the Respondent's employees and actively lent assistance to the union's cause. Shortly after the employees signed applications for membership in the Union, Barnett interrogated Click and other employees in regard to their union activities and sympathies, told Click that dissatisfied employees could quit, and warned him that

"we don't want any damned union around here. They leave a very bad taste in my mouth, and it would if you joined the Union behind my back." Barnett further stated that the Union "left a very bad taste in his mouth \* \* \* he wouldn't rest until it died." Indicative of the Respondent's motivation in the termination of Click's employment 4 days after the Union won the consent election was Barnett's statement to employee Smith, shortly before the election, to the effect that if Smith "voted against the union [he] wouldn't have anything to fear from Mr. Click because he wouldn't be there."

Upon the entire record, the undersigned concludes and finds that the Respondent discharged Ralph S. Click because of his membership in and activities on behalf of the Union and that the reasons advanced by the Respondent for his discharge are without merit and at most were a pretext to conceal its illegal motivation for his discharge. By thus discriminating against Click, the Respondent has violated Section 8 (a) (3) of the Act and has discouraged membership in the Union and interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

#### IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among

the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### V. The remedy

The undersigned has found that the Respondent violated the Act by interrogating its employees concerning their union sympathies and activities, by making other coercive statements and threats to its employees, and by discriminatorily discharging Ralph S. Click on September 2, 1949. In view of these findings, it will be recommended that the Respondent take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminated with respect to the hire and tenure of employment of Ralph S. Click, by discharging him because of his union membership and activities, it will therefore be recommended that the Respondent offer Click immediate and full reinstatement to his former or substantially equivalent position,<sup>14</sup> without prejudice to his seniority and other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him. Consistent with

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<sup>14</sup>In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." See *The Chase National Bank of the City of New York, San Juan, Puerto Rico*, Branch, 65 NLRB 827.



the Board's new policy in the method of computing back pay,<sup>15</sup> it will be recommended that the loss of pay be computed on the basis of each separate calendar quarter, or portion thereof, during the period from the discriminatory action to the date of a proper offer of reinstatement. The quarterly periods, hereinafter called quarters, shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which he would normally have earned for each quarter, or portion thereof his net earnings,<sup>16</sup> if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter. It will also be recommended that the Respondent make available to the Board, upon request, payroll and other records to facilitate the checking of the back pay due.

In view of the Respondent's discriminatory discharge of Click, and its other acts of interference,

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<sup>15</sup>F. W. Woolworth Company, 90 NLRB No. 41.

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<sup>16</sup>By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the Respondent, which would not have been incurred but for the unlawful discrimination and the consequent necessity of his seeking employment elsewhere. See *Crossett Lumber Company*, 8 NLRB 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation v. N.L.R.B.*, 311 U.S. 7.

restraint, and coercion, there is danger that the commission of unfair labor practices generally is to be anticipated from the Respondent's unlawful conduct in the past. The undersigned will therefore recommend that the Respondent not only cease and desist from the unfair labor practices found, but also cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

#### Conclusions of Law

1. The operations of Rogue Valley Broadcasting Co., Inc. (KWIN) constitute trade, traffic, and commerce among the several States within the meaning of Section 2 (6) and (7) of the Act.

2. Local No. 49, International Brotherhood of Electrical Workers, AFL, is a labor organization within the meaning of Section 2 (7) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. By discriminating in regard to the hire and tenure of employment of Ralph S. Click, thereby dis-

couraging membership in a labor organization, the Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

### Recommendations

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends that the Respondents, Rogue Valley Broadcasting Co., Inc. (KWIN), Ashland, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local No. 49, International Brotherhood of Electrical Workers, AFL, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment;

(b) Interrogating its employees in regard to their union sentiments;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local No. 49, International Brotherhood of Electrical Workers, AFL, or any other labor organization, to bargain col-

lectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the undersigned finds will effectuate the policies of the Act.

(a) Offer to Ralph S. Click immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges;

(b) Make whole Ralph S. Click for any loss of pay he may have suffered because of the discrimination against him, in the manner set forth in the section entitled "The Remedy";

(c) Upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay and the right of reinstatement under the terms of these recommendations;

(d) Post at its station at Ashland, Oregon, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region,

shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and be maintained by it for a period of at least sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the Nineteenth Region in writing, within twenty (20) days from the date of the receipt of this Intermediate Report, what steps the Respondent has taken to comply herewith.

It is further recommended that unless on or before twenty (20) days from the date of receipt of this Intermediate Report, the Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

Dated at Washington, D. C., this 10th day of November, 1950.

[Seal]      /s/ FREDERIC B. PARKES,  
2nd Trial Examiner.

## Appendix A

Notice to All Employees  
Pursuant to the Recommendations  
of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in Local No. 49, International Brotherhood of Electrical Workers, AFL, or in any other labor organization of our employees, by discriminating in regard to their hire or tenure of employment or any term or condition of employment.

We Will Not interrogate our employees concerning their union sentiments.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local No. 49, International Brotherhood of Electrical Workers, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act.

We Will Offer Ralph S. Click immediate and

full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination.

All our employees are free to become, remain, or refrain from becoming or remaining, members of the above-named union or any other labor organization, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act. We will not discriminate against any employee because of membership in or activity on behalf of any such labor organization.

ROGUE VALLEY  
BROADCASTING CO., INC.  
(KWIN)

.....,  
Employer.

Dated.....

By .....  
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

United States of America  
Before the National Labor Relations Board  
Case No. 36-CA-113

In the Matter of:

ROGUE VALLEY BROADCASTING CO., INC.  
(KWIN),

and

LOCAL No. 49, INTERNATIONAL BROTHER-  
HOOD OF ELECTRICAL WORKERS, AFL.

DECISION AND ORDER

On November 10, 1950, Trial Examiner Frederic B. Parkes, 2nd, issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board<sup>1</sup> has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the

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<sup>1</sup>Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.



entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.<sup>2</sup>

### Order

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Rogue Valley Broadcasting Co., Inc. (KWIN), Ashland, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local No. 49, International Brotherhood of Electrical Workers, AFL, or in any other labor organization of its employees, by discharging and refusing to reinstate any of its employees or by discriminating in any

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<sup>2</sup>However, in adopting the Trial Examiner's conclusion that the Respondent violated Section (8) (a) (1) of the Act, we do not rely on Barnett's statement to employee Smith that the Respondent could not afford to grant a pay increase at that time. See A. Kravitz & Company, 89 NLRB No. 192.

In addition, we do not adopt the Trial Examiner's statement that Barnett's alleged reluctance to discharge Click during the pendency of the representation proceeding was incompatible with the Respondent's position that Click was a supervisor. As noted elsewhere in the Intermediate Report, at the time of the election, the Respondent took the position that Click was not a supervisor. However, the Respondent's later position, in its answer and at the hearing, that Click was a supervisor is clearly incompatible with its position throughout the representation proceeding.

other manner in regard to their hire and tenure of employment or any term or condition of employment.

(b) Interrogating its employees in regard to their union sentiments; and threatening its employees with discharge or other economic reprisals because of their union affiliation or activities.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local No. 49, International Brotherhood of Electrical Workers, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Ralph S. Click immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Make whole Ralph S. Click, in the manner set forth in the section of the Intermediate Report

entitled "The remedy," for any loss of pay he may have suffered as a result of the Respondent's discrimination against him.

(c) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all pay roll records, social security payment records, time cards, personnel records and reports, and all other records necessary to an analysis of the amount of back pay due and the right of reinstatement under the terms of this Order.

(d) Post at its station at Ashland, Oregon, copies of the notice attached hereto and marked Appendix A.<sup>3</sup> Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days

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<sup>3</sup>In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

from the date of this Order, what steps the Respondent has taken to comply herewith.

Signed at Washington, D. C., March 27, 1951.

JOHN M. HOUSTON,  
Member,

ABE MURDOCK,  
Member,

PAUL L. STYLES,  
Member,

[Seal] NATIONAL LABOR  
RELATIONS BOARD.

### Appendix A

#### Notice to all Employees Pursuant to A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in Local No. 49, International Brotherhood of Electrical Workers, AFL, or in any other labor organization of our employees, by discharging and refusing to reinstate any of our employees or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

We Will Not interrogate our employees in regard

to their union sentiments; or threaten our employees with discharge or other economic reprisals because of their union affiliation or activities.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local No. 49, International Brotherhood of Electrical Workers, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will offer to Ralph S. Click immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered as a result of our discrimination against him.

All our employees are free to become, remain, or refrain from becoming or remaining, members of Local No. 49, International Brotherhood of Electrical Workers, AFL, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with

Section 8 (a) (3) of the Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or nonmembership in any such labor organization.

Dated:.....,

ROGUE VALLEY BROADCASTING CO., INC. (KWIN)

.....,

(Employer)

By .....,

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board  
Nineteenth Region

Case No. 36-CA-113

In the Matter of:

ROGUE VALLEY BROADCASTING CO., INC.  
(KWIN)

and

LOCAL No. 49, INTERNATIONAL BROTHER-  
HOOD OF ELECTRICAL WORKERS, AFL.

Pursuant to notice, the above-entitled matter  
came on for hearing at 10 o'clock a.m.

Before: Frederic B. Parkes, II, Esq.,  
Trial Examiner.

Appearances:

HUBERT J. MERRICK, ESQ.,

Appearing on Behalf of the National La-  
bor Relations Board.

A. P. BLAIR,

Appearing on Behalf of Rogue Valley  
Broadcasting Co., Inc., the Respondent.

R. F. RENOUD,

Appearing on Behalf of Local Union No.  
49, International Brotherhood of Electri-  
cal Workers, the Union.

## PROCEEDINGS

Mr. Merrick: If the Trial Examiner please, I would like to have this file marked for identification as General Counsel's Exhibit 1.

For the sake of the record, this exhibit consists of all of the formal papers filed in this proceeding to date and reflects the formal action that has been taken.

Would Respondent care to see it?

Mr. Blair: We are satisfied.

Mr. Merrick: For the record, General Counsel's Exhibit consists of the following documents:

1-A is the Affidavit of Service of the Charge.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 1-A for identification.)

Mr. Merrick: 1-B is the original charge filed by the charging union, Local No. 49 of the International Brotherhood of Electrical Workers.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 1-B for identification.) [6\*]

Mr. Merrick: I-C is the Notice of Hearing, setting the hearing for the Jackson County Court House at Medford.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 1-C for identification.)

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\*Page numbering appearing at top of page of original Certified Reporter's Transcript.



Mr. Merrick: 1-D is the Board's or the General Counsel's complaint issued in this matter.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 1-D for identification.)

Mr. Merrick: 1-E is an Affidavit of Service of the complaint, notice of hearing and charge.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 1-E for identification.)

Mr. Merrick: 1-F is a document filed by the Respondent, entitled "Answer to Complaint and Motion for Dismissal."

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 1-F for identification.)

Mr. Merrick: 1-G is a notice of change in place of hearing from the Court House to the Old Council Chambers, City Hall, Medford.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 1-G for identification.)

Mr. Merrick: 1-H is the Affidavit of Service of this notice of change in place of hearing.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 1-H for identification.) [7]

Mr. Merrick: Do the parties care to examine this?

(No response.)

Mr. Merrick: I would like to offer General Counsel's Exhibit 1 in evidence.

Trial Examiner Parkes, II: Is there any objection to the offer?

(No response.)

Trial Examiner Parkes, II: General Counsel's Exhibit 1, consisting of documents numbered 1-A through 1-H, is received in evidence.

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A through 1-H for identification, were received in evidence.)

\* \* \*

Trial Examiner Parkes, II: We will be on the record.

In regard to the motion contained in Respondent's answer, that is, the motion for dismissal, it is hereby denied at this time, but will be considered as an affirmative defense of the Respondent to the 8(a)(3) allegations of the complaint.

I believe in our off the record discussion Mr. Blair stated that he had another motion he would like to present at this time.

Mr. Blair has just handed us, Counsel and myself, that is, [8] a motion to dismiss.

Shall it be marked as an addition to Exhibit 1? I think it might well be.

Mr. Merrick: Yes, sir.

Trial Examiner Parkes, II: That will make it 1-I then, wouldn't it?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 1-I for identification.)

Trial Examiner Parkes, II: If none of the parties object, we will consider General Counsel's Exhibit 1-I as admitted in evidence.

(The document heretofore marked General Counsel's Exhibit No. 1-I for identification, was received in evidence.)

Trial Examiner Parkes, II: At this time, I shall deny the motion to dismiss on jurisdictional grounds. This raises the issue of jurisdiction and will have to be litigated and the facts developed as to the company's operations.

I might state that my denial of both motions is not prejudicial to a new motion at a subsequent date.

I think the record should reflect your position, Mr. Blair, to Paragraph VI of the complaint, which in essence is the 8(a)(1) allegation.

Mr. Blair: For the record, Mr. Trial Examiner, we will at this time deny the allegation of the complaint of the employer—that the employer by any act or conduct discriminated against, coerced or intimidated any employee in his right to join or not to join the union, or to participate in union activities.

We are assuming, however, that in the complaint

that they are specifically pinning it down to one man in question and not to the several employees in the station, inasmuch as there is nothing in the complaint that anybody else is involved in the complaint besides one Ralph Click.

Trial Examiner Parkes, II: Well, I don't know whether you are justified in making that assumption or not.

Mr. Merrick: I think the language of the complaint will speak for itself. The word "employees" is used there. I think that staves off opposition.

Trial Examiner Parkes, II: Yes, it's "employees," I know, and that would include more than that one employee.

Mr. Blair: For the record, we make the denial in the same broad terms as the Board makes the charge.

Trial Examiner Parkes, II: Yes, I think the record is clear that you have now by your statement and by your answer denied the allegations of the fair labor practices contained in the complaint.

I just wanted to make that clear and sure before we started.

Mr. Merrick: I'd like to be heard if I may, Mr. Trial [10] Examiner.

Trial Examiner Parkes, II: Yes, sir.

Mr. Merrick: I'd like to state my position regarding this motion to dismiss that is entitled 1-I.

When we came here today, General Counsel and I were fully prepared to introduce evidence as to the material allegations of the complaint. However,

regarding this motion to dismiss on commerce, I do claim some surprise on that in view of the fact that prior to this time, as I will show, the Respondent agreed to allow the Board to assert jurisdiction over its operations.

Now, the allegation raised by the motion to dismiss that it is not engaged in commerce is a surprise as far as we are concerned, and at the close of the hearing, after we put in all of our evidence, I may ask for additional time to adduce commerce information, because this certainly is a surprise to us.

I think it is clear that the original three pleadings filed by both the General Counsel and by the Respondent raised only one issue. The sole issue raised by those means was as to whether or not Ralph Click was a supervisor or an employee.

There were no allegations in our answer directed to the allegations of the complaint. However, we were prepared to produce evidence on that.

However, we are claiming surprise regarding this motion to dismiss on commerce grounds. [11]

Trial Examiner Parkes, II: The record may show your position.

I suggest that you proceed with your case in chief and possibly during the course of your presentation of the case, you and Counsel might be able to stipulate as to the facts on commerce, I don't know, and resolve it.

Otherwise, you will have to adduce those facts some time.

Mr. Merrick: Is there any question—I would

like to address this question to Counsel—is there any question as to the status of the charging union as a labor organization?

Mr. Blair: None whatever.

Mr. Merrick: Well then, I will call Mr. Barnett.

EDWARD P. BARNETT

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Merrick:

Q. Will you state your name?

A. Edward P. Barnett.

Q. What is your address?

A. 411 Melrose Avenue, Medford, Oregon.

Q. And what is your occupation?

A. Manager of Radio Station KWIN.

Q. That is the Respondent in this proceeding?

A. Yes.

Mr. Merrick: If the Trial Examiner please, I would like [12] to ask permission to examine this witness as an adverse witness pursuant to Rule 43-B.

Trial Examiner Parkes, II: Permission is granted.

Q. (By Mr. Merrick): What is the location of Radio Station KWIN?

A. 1160 Helman Road, Ashland, Oregon.

Q. And where is Ashland, Oregon, located in relation to the California border?

(Testimony of Edward P. Barnett.)

A. Approximately thirty miles north.

Q. Now, I would like to hand you General Counsel's Exhibit 1 and refer you to Exhibit 1-D, which is the complaint filed by General Counsel, and referring you to Paragraph II of that complaint, are the allegations contained therein substantially true?

A. Well, here, I have a question here.

Q. Well, are they true, first of all?

Let me put it another way.

Was that information supplied by you to the Board? A. Yes.

Q. Well, is it true?

A. Yes, it is. The only thing, under the present circumstances, that I question, I question what is meant by the instrumentalities of interstate commerce. I mean, is that meant to be telephone lines or broadcast signals, or what?

Q. Well, you do broadcast, do you, in interstate commerce? [13]

A. Yes, we send out broadcast signals.

Q. Do you use telephone facilities?

A. Yes, we use telephone lines.

Q. And what telephone company is that?

A. Pacific Tel. and Tel.

Q. And in addition, do you carry any interstate network programs?

A. We have no network contracts. No, we have not contracted with the networks. We do pick up a program that is originated in L. A. It is not through a contract with the network. It is a con-

(Testimony of Edward P. Barnett.)

tract direct with the advertiser or with the agency representing the advertiser.

Q. What program is that?

A. Well, actually there are two that run three days a week on alternate days. The Haven Rest, a religious program, and the Bible Institute religious program.

Q. And those originate in Los Angeles, California? A. Yes.

Trial Examiner Parkes, II: And what is their duration?

The Witness: Thirty-minute programs.

Trial Examiner Parkes, II: During the time of a week, how many minutes would that be?

The Witness: Well, that is six days a week, thirty minutes a day.

Q. (By Mr. Merrick): How many local advertisers do you have? [14]

A. I will have to hazard somewhat of a guess. I couldn't hit it right on the nose, but I would say sixty.

Q. Do you represent all—or do you carry advertising for all of the larger firms in this area?

A. Not all the larger firms, no. We have some larger firms that do advertise with us.

Mr. Merrick: I think I had better defer this question of commerce until we have more evidence on it.

Trial Examiner Parkes, II: Very well.

Mr. Merrick: Unless the Trial Examiner is sat-



(Testimony of Edward P. Barnett.)

ified we have enough commerce information in the record.

Trial Examiner Parkes, II: Well, I'm not at this point.

Q. (By Mr. Merrick): Mr. Barnett, how long have you been Manager of KWIN?

A. Two years.

Q. When did you start, do you recall?

A. As Manager?

Q. Yes. A. On the first of September, '48.

Q. And what was your job when you started September 1, 1948? Did you start as Manager?

A. I started as Manager then, yes.

Q. And you've held that position to the present date? A. That's right.

Q. Were you ever employed by KWIN in any other capacity [15] besides Manager?

A. Yes, I was Commercial Manager part of the time.

Q. And how long were you Commercial Manager? A. Approximately two years.

Q. And prior to that, did you have any other job with KWIN? A. No.

Q. Now, roughly what are your duties as Manager of KWIN?

A. General management of the radio station operations, and that takes in, well, all the duties of management.

Q. Do you supervise all the employees?

A. I supervise all of the employees through de-

(Testimony of Edward P. Barnett.)

partment heads. The organization is broken down into departments.

Q. All right. What departments do you have?

A. We have an Engineering Department—well, it's actually Engineering and Announcing Department, Program Department, Commercial Department, and what we consider the front office, the receptionist and stenographer.

Q. Now, at the time Mr. Click was discharged, how many people did you have in the Announcing and Engineering Department? A. Four.

Q. And how many in the Program Department?

A. One actually. The way our organization is set up, as I said a moment ago, our engineers and announcers are in one department, but actually as announcing they fall in the department of programs also, because as they announce they are [16] program people, but they are licensed engineers also. So, that puts them in the Engineering Department, too.

Q. It's your recollection you had one in the Program Department? A. Yes.

Q. And how many in the Commercial Department? A. Three.

Q. And how many in the front office?

A. One.

Q. Well, that's a total of nine employees. Did that include yourself?

A. No, that wouldn't include myself.

Q. Now, do you recall the names of the people that you had in the Announcing and Engineering Department?

(Testimony of Edward P. Barnett.)

A. Yes. I had Ralph Click, Charles Fields, Phil George, Don Smith.

Q. And in the Program Department?

A. Don Berg, and also we had a dual role of Charles Fields. Charles Fields, he was our Program Director, but at the same time he was a licensed engineer and announcer in the Engineering Department.

Q. Well, then, who did you have in your Commercial Department?

A. Lane Bardeen, Ned Liebman and Doyle Seely.

Q. Then, who did you have in the front office?

A. Clara Daniels. [17]

Q. Now, as Commercial Manager for KWIN, what were your duties?

A. I was responsible for the source of revenue for the station as far as the selling end, not only direct sales myself, but the supervision and direction of any salesmen who happened to be in that department.

Q. In other words, you did not interest yourself in the technical aspects of the business?

A. No.

Q. Did you do so after you became Manager?

A. Well, actually, I'm no technician. I couldn't—I was not able to go into the Engineering Department and do anything other than recommend that this be done or that be done. I mean as far as speaking in technical terms, I couldn't because I'm not a technician.

(Testimony of Edward P. Barnett.)

So, I can't say that I directly was in control of our equipment. I didn't know enough about it to be—I mean, I was naturally Manager of the station. It fell under my jurisdiction, but I had to go through a department head because I'm no technician, and I'm no engineer at all.

Q. Who was your department head at the time Mr. Click was employed as an engineer?

A. The department head in the Engineering Department? Ralph Click.

Q. In other words, you know very little about engineering [18] yourself, is that your testimony?

A. I am no engineer. That's right.

Q. Now, what were Mr. Click's duties?

A. Mr. Click's duties were announcing as well as being in charge of the Engineering Department. He was responsible for the condition of the technical equipment. He was responsible for the—to some extent—the purchase of normal maintenance supplies.

I say, normal maintenance supplies. I mean, it goes just up to a certain point. He was able to purchase things that—such as, tube replacements, minor parts, and what-not.

Q. Major purchases, he was not responsible for?

A. Major purchases came to me for my approval, and if they were too large, of course, then I'd have to go higher for authority on them.

Q. Now, his primary duties were in connection with the condition of the equipment, were they not?

A. Primarily, yes. However, he—I mean, nor-

(Testimony of Edward P. Barnett.)

mal duties of a chief engineer also include building maintenance, as well as the technical condition of the broadcasting equipment.

Q. Well, under the F.C.C., which governs your station, he was primarily responsible for the condition of the equipment, right?

A. Yes, as chief engineer.

Q. Was he required to have any license? [19]

A. Yes, he was required to have an engineer's license.

Q. Now, Mr. Click was discharged as of September 2nd, 1949, was he not? A. Yes.

Q. And who replaced Mr. Click?

A. Philip R. George.

Q. And what had been his experience as an engineer prior to taking Mr. Click's place?

A. He had been a combination engineer-announcer at the station. He held a first class license. He had never before been chief engineer of any radio station to my knowledge.

Q. Well, had he had any radio experience outside of working at KWIN?

A. I was not Manager of the station at the time he was hired. However, I believe that he was hired right from school.

Q. And when he started, did he start as a radio technician?

A. He started as a combination technician-announcer.

Q. And who instructed him when he first went to work?

(Testimony of Edward P. Barnett.)

A. As I said, I wasn't Manager at that time, and what I say, I assume that it was the chief engineer.

Q. Probably Mr. Click, then?

A. Yes. I was not Manager at that time, however. I assume that's the way it was.

Q. Now, in August of '49, do you recall the Board election at your station? [20] A. Yes.

Q. I believe that was August 29th, 1949.

A. I forget the exact date, but that was approximately it.

Q. Now, prior to that election, do you recall questioning the employees as to the union beliefs and activities?

A. I did talk to all the employees. I mean the licensed employees or the announcers. I did talk to them regards to the union activity that was going on, yes.

Q. In other words, you questioned the people that were in the unit that were going to vote, is that right?

A. I asked them what their ideas were, yes.

Q. And you told them what your ideas were?

A. I told them that anything I was saying to them I was speaking as a personal opinion. I told them it did not——

Q. It was not the policy of the station?

A. That's right. I said it was my own opinion, that their opinion was as good as mine, and I didn't tell them that I didn't feel as though the station could afford the wage increase.

(Testimony of Edward P. Barnett.)

I made it very clear that I wasn't interested in how their vote was coming out. That was up to them, one thing that should be decided in their own minds, but I said I didn't want to tell them how to vote in the union election. That was up to them.

I felt I was—after all, I was responsible for [21] the station operation, and I knew that the station financially could not afford a wage increase. In all fairness to my job, I had to pass that on, but outside of that I told them that as far as their ideas were concerned, they were as good as mine.

Q. In other words, you were more or less interested in letting them know that they could vote as they pleased in the election?      A. That's right.

Q. You were also interested in finding out what their views were on unions also?

A. Well, yes. The big thing was to let them—was to tell them we couldn't afford a wage increase. I mean, that was my job.

Q. That was your biggest worry?

A. Well, yes. That's the first thing the average employer thinks about when they think of a union contract is of your overhead going up.

Q. Now, prior to your questioning this man regarding the union, had you received a letter from the union?      A. Yes.

Q. Do you have a copy of that letter with you?

A. Yes, I have it in my file.

Q. Is it possible to see it?

(Testimony of Edward P. Barnett.)

Well, maybe we could use our copy if you care to keep the original. [22]

A. Is this the one you're referring to, July the 25th?

Q. Yes.

Mr. Merrick: If you have no objection, I would like to put in the copy.

May we have this marked for identification as General Counsel's Exhibit 2?

Trial Examiner Parkes, II: It may be so marked.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Q. (By Mr. Merrick): I would like to hand you what is marked for identification as General Counsel's Exhibit 2, which purports to be a copy of a letter addressed to the Manager of Radio Station KWIN and signed by Roy F. Renoud, Business Representative.

Did you receive the original of that letter?

A. Yes, I did.

Q. And then this questioning that occurred was after the receipt of that letter and before the Board conducted an election?

A. Yes.

Mr. Merrick: I would like to offer this in evidence, GC-2 for identification.

Trial Examiner Parkes, II: Any objection?

(No response.)



(Testimony of Edward P. Barnett.)

Trial Examiner Parkes, II: General Counsel's Exhibit 2 is received in evidence. [23]

(The document heretofore marked General Counsel's Exhibit No. 2 for identification, was received in evidence.)

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GENERAL COUNSEL'S EXHIBIT No. 2

Local Union No. 49

International Brotherhood of Electrical Workers

720 S.W. Ankeny Street—Broadway 5479

Portland 5, Oregon

July 25, 1949

Steam Fitter Bldg.

1417 S.W. 3rd Ave.

Portland 1, Oregon

Br 5479

Manager of Radio Station KWIN

1160 Helman Street

Ashland, Oregon

Dear Sir:

This is to advise you that Local 49, International Brotherhood of Electrical Workers, represents a majority of your employees and we are filing as of this date with the National Labor Relations Board a petition asking for recognition, as directed by Section 9 (C) (1) of the Labor Management Act of 1947.

We would like to know your position in regards

(Testimony of Edward P. Barnett.)

to recognizing Local 49 of the I.B.E.W. as the collective bargaining agency for all of your broadcast technicians and announcers employed in your station. Any discharges or attempts to coerce or intimidate will be viewed as an unfair labor act and such steps will be taken as directed by the Labor Management Act of 1947.

Hoping you give this your immediate attention and advise us as to your position at your earliest opportunity, I am,

Very truly yours,

(Signed)

ROY F. RENOUD,

Bus. Rep. Local 49, I.B.E.W.

RFR:AL

Registered—Return Receipt Requested

Admitted August 22, 1950.

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Q. (By Mr. Merrick): Now, at the time you questioned these people in the Engineering and Announcing Department, is it your testimony that Mr. Click and Mr. Smith, Mr. Fields and Mr. George were in that unit?

A. They were in that department, yes.

Q. And you questioned each one of those?

A. Yes.

Q. You questioned any of the other employees in the other departments?

(Testimony of Edward P. Barnett.)

A. No. I mean, it was the I.B.E.W., I understood.

Q. Did you question Mr. Seely or Mr. Liebman?

A. I don't—no, I mean, there were discussions at the station among the employees. I mean in other than the Engineering Department. There was a question as to whether or not technically Seely, who was an announcer at that time, fell under the jurisdiction of this unit. I mean, we—I wondered about that.

Q. Well, anyway, do you recall the election being held on August 29th? A. Yes.

Q. And the results of the election?

A. Yes.

Q. The I.B.E.W. won, I believe, did they [24] not? A. Yes.

Q. Three votes to one, is that correct?

A. Yes.

Q. And as a result of that election, they were certified? A. Yes.

Q. Now, do you recall filing a protest to that election on or about September 12th?

A. Protest was filed, yes.

Q. Was that filed by the Counsel, Mr. Blair?

A. Yes.

Q. May we stipulate as to the contents of that protest? I don't have a copy of the original. Is this the protest?

“It has come to our attention that employee at one of the stations by the name of Click had used his influence to coerce and intimidate at least one

(Testimony of Edward P. Barnett.)

other station employee in an attempt to get him to vote in favor of the union.”

Is that the basis of the protest?

A. That was the protest filed by Mr. Blair. I actually don't believe I saw a copy of that myself, and I couldn't tell you word for word on that at all. I didn't see it. Mr. Blair could answer the question, however.

Mr. Merrick: I will ask Counsel if we may stipulate that that is the substance of the protest filed by Respondent to the election held in Case No. 36-RC-320.

Mr. Blair: Well, frankly, I don't find a copy of that [26] letter in my file.

Mr. Merrick: Well, is that the substance of your protest?

Mr. Blair: If there is such a letter, Mr. Examiner, I will have to ask counsel to present it here as the best evidence because I can find no copy in my file.

Trial Examiner Parkes, II: Well, he's asking if that is the substance of your letter.

Since you wrote the letter, I think you could indicate that.

Mr. Merrick: I would like to inquire if the election was protested on the grounds that Click coerced the employees.

Mr. Blair: Well, it was, but whether it was by letter or not——

Trial Examiner Parkes, II: Have we also stipulated the date of this certification?

(Testimony of Edward P. Barnett.)

Mr. Merrick: I think the Board—I'd like to have the Trial Examiner take judicial notice of that certification. I don't have the date. Wait a minute.

On September 7, 1949, the Board certified Local 49, I.B.E.W., as the bargaining agent for the employees.

Trial Examiner Parkes, II: Very well.

Q. (By Mr. Merrick): Now, Mr. Barnett, regarding this protested election, were you the one that furnished the information to Mr. Blair as to the basis of the protest? [26]

A. Yes.

Q. Who was the employee that had been intimidated by Mr. Click?

A. Don Smith.

Q. Now, you discharged Mr. Click on September 2, 1949, is that correct?

A. Yes.

Q. When he was discharged, do you recall writing "Unsatisfactory" on his F.C.C. license?

A. Yes, I did.

Q. Handing you what is entitled "Federal Communications Commission Radio-Telephone Operator License," (handing), is this the license of Mr. Click you certified as being unsatisfactory?

A. Yes.

Q. Now, when you certified Mr. Click as being unsatisfactory, did you subsequently receive any communication from the Federal Communications Commission as to why he was marked unsatisfactory?

A. Yes, I received a letter from the F.C.C., saying that Mr. Click had written them.

(Testimony of Edward P. Barnett.)

Q. Do you know what the effect of an unsatisfactory recommendation is to the licensee?

A. Yes.

Q. What it is?

A. Well, it's an unsatisfactory—really means that they [27] cannot become employed by another radio station unless they want to overlook the fact or didn't realize they were getting an unsatisfactory man.

Q. Did you reply to the Federal Communications Commissioner in answer to their inquiry regard Mr. Click?      A. Yes.

Q. Do you have a copy of your letter that you sent to them?      A. Yes.

Q. Do you want to put that in evidence, or have you another copy?

A. Well, it doesn't matter as long as I can keep this.

Mr. Merrick: I'd like to have this letter marked for identification as General Counsel's Exhibit 3.

Trial Examiner Parkes, II: It may be so marked.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3 for identification.)

Q. (By Mr. Merrick): I would like to hand you what has been marked General Counsel's Exhibit 3. It purports to be a letter from the Federal Communications Commission to Mr. Ralph S. Click, and I'd like to refer to the paragraphs numbered 1 and 2 there.

(Testimony of Edward P. Barnett.)

Did you assign those reasons in answer to the F.C.C. inquiry?

A. Did I assign these reasons?

Q. Yes. [28]            A. Yes.

Mr. Merrick: Would you care to examine it?

Mr. Blair: No objection.

Mr. Merrick: I would like to offer in evidence—however, if it's agreeable with Counsel, I'd like to substitute a copy.

Mr. Blair: That's all right.

Mr. Merrick: Mr. Click would like to keep the original.

Q. (By Mr. Merrick): And those reasons set out in Paragraphs 1 and 2 were the reasons assigned by you for writing "unsatisfactory" on his license?

A. That is the reason for the unsatisfactory entry.

Trial Examiner Parkes, II: Are you through with this at this time?

Mr. Merrick: Yes, sir.

Trial Examiner, Parkes, II: As I understand, there is no objection to the offer.

Mr. Blair: None at all.

Trial Examiner Parkes, II: General Counsel's Exhibit 3 will be received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 3 for identification, was received in evidence.)

(Testimony of Edward P. Barnett.)

GENERAL COUNSEL'S EXHIBIT No. 3

Federal Communications Commission  
Washington 25, D. C.

November 28, 1949

In Reply Refer to: 8032

Mr. Ralph S. Click

121 Manzanita Street

Ashland, Oregon

Dear Sir:

Reference is made to the recent endorsement of your license service record as "unsatisfactory" by the manager of radio station KWIN. In response to an inquiry of the Rogue Valley Broadcasting Company, licensee of radio station KWIN, regarding this endorsement the Commission has received information indicating that the endorsement was not based on specific violations of the Communications Act of 1934, as amended, or the Commission's Rules but on the basis of the following:

"1. During the months of May and June, 1949, a Mr. Wallace C. Clark was employed at KWIN as a "man on the street" reporter. Mr. Clark used a wire recorder to record a daily program from the streets of the business district. For some unknown reason Mr. Click dislike Mr. Clark. As Chief Technician for KWIN it was the duty of Mr. Click to properly maintain the equipment used by Mr. Clark on his program. Never-the-less the equipment was constantly out of order in some fashion. Either the



(Testimony of Edward P. Barnett.)

recorder itself was not in good operating condition or the wire cartridges used were being broken. Naturally Mr. Click blamed Mr. Clark for the trouble and constantly recommended that the man be discharged. It is true Mr. Clark was no technician, however he was fully capable of operating a wire recorder. Mr. Click admittedly disliked the man and stated to the management he would not cooperate in the maintenance of the equipment used by Mr. Clark.

2. On July 15 and 16, 1949, KWIN did a remote broadcast of the annual local rodeo. For the broadcast we were using two microphones. One was placed in the broadcast booth where the remote console and the Chief Engineer would also operate. The other microphone was placed about a hundred yards away to be near the judges stand. There was a sportscaster at each mike. Mr. Click was engineering from the console at the booth. Sports-caster Ned Liebman was the man at the mike near the judges stand. A few days prior to this Mr. Click had taken a dislike to Mr. Liebman because of some difference of opinion and had complained to the management about having the man in the employ. During the broadcast from the rodeo most of the action was to be described from the judges by Mr. Liebman, yet the broadcast from that point was practically lost because of poor control by the engineer. Mr. Click was perfectly capable of proper operation from the control booth yet during the

(Testimony of Edward P. Barnett.)

times when Mr. Liebman was announcing the proper gain was ignored."

The above information, which has been made a part of the Commission's files and which may be considered in connection with an application for renewal of the license involved herein, is submitted for your comment.

Very truly yours,

T. J. SLOWIE,  
Secretary.

Admitted August 22, 1950.

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Mr. Merrick: Now, if the Trial Examiner please, I would like to have this letter marked for identification as GC-4.

Trial Examiner Parkes, II: It may be so [29] marked.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 4 for identification.)

Q. (By Mr. Merrick): GC-4 purports to be the original of a letter from Mr. Edward P. Barnett, Manager of KWIN, to Mr. A. J. Hedges, Field Examiner, N. L. R. B.

Handing you what has been marked as General Counsel's Exhibit 4, is that your signature that appears thereon? A. Yes.

(Testimony of Edward P. Barnett.)

Q. And what was the cause of your writing this letter to Mr. Hedges?

A. I imagine it was in answer to an inquiry of Mr. Hedges.

Q. As to why Mr. Click had been fired?

A. Yes.

Mr. Merrick: I would like to offer in evidence General Counsel's Exhibit 4 for identification.

Trial Examiner Parkes, II: Any objections?

Mr. Blair: None.

Trial Examiner Parkes, II: General Counsel's Exhibit 4 is received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 4 for identification, was received in evidence.)

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#### GENERAL COUNSEL'S EXHIBIT No. 4

Rogue Valley Broadcasting Company  
Studios at 1160 Helman Street  
P. O. Box 305, Ashland, Oregon

November 10, 1949

Mr. A. J. Hedges, Field Examiner  
National Labor Relations Board  
715 Mead Building  
Portland 4, Oregon

Dear Mr. Hedges:

We are in receipt of a letter from Mr. Robert J. Wiener dated October 18, 1949, with an attached

(Testimony of Edward P. Barnett.)

copy of charge filed against KWIN by Local 49, International Brotherhood of Electrical Workers, A.F.L. Mr. Wiener requested a statement of fact in the matter be directed to you as Examiner in the case.

According to the charge, Ralph S. Click, formerly Chief Engineer at KWIN, was discharged because of union activity. There is no basis for the charge as Mr. Click was released for incompetency and willful neglect of duty.

Very truly yours,

/s/ EDWARD P. BARNETT,  
Manager.

Received November 14, 1949.

Admitted August 22, 1950.

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Q. (By Mr. Merrick): Now, referring to General Counsel's Exhibit 3, do you recall a Mr. Wallace C. Clark who was employed at KWIN?

A. Yes. [30]

Q. Now, you state in this General Counsel's Exhibit 3 that "Never-the-less the equipment was constantly out of order in some fashion."

What equipment are you referring to?

A. The wire recording equipment that Mr. Clark used in his daily work, his broadcast.

Q. What was wrong with the wire recording equipment?

(Testimony of Edward P. Barnett.)

A. The reason that I say it was constantly out of order in some fashion is because of the fact that I am not a technician and I could not put my finger on the reasons for the recorder to be out of order.

If it is out of order, I know whether it works or not. What makes it not work is something that I cannot answer.

Q. Is it your impression that it was Mr. Click's fault that it was not in good working order?

A. Yes.

Q. And in the next sentence, you state:

"Either the recorder itself was not in good operating condition or the wire cartridges used were being broken."

Do you know why those wire cartridges were being broken? A. I do not know why.

Q. Did you investigate?

A. Suddenly it happened. I mean, after a long period of time of using wire cartridges, suddenly they started to being broken.

Q. Were a great many broken? [31]

A. Yes.

Q. They're quite expensive, are they not?

A. Well, to us, they are.

Q. Is it possible to repair them at the station?

A. Not satisfactorily. I mean, I don't believe they can be repaired.

Q. But you didn't investigate as to why they were being broken?

A. Well, no, I couldn't trace it down. I couldn't find out why.

(Testimony of Edward P. Barnett.)

Q. But you held Mr. Click responsible for it?

A. I did.

Q. Was it your recollection that Mr. Clark knew nothing about the technical aspects of operating the wire recorder?

A. He knew enough to operate it, but as far as the operation of the wire recorder, there is nothing difficult in that.

Other members of the station staff can operate the wire recorder. I mean, whether they use it in their daily work or not.

Q. Well, did you give Mr. Click orders to show Mr. Clark how to operate it when he first started to work there?      A. Yes.

Q. That was because Mr. Clark did not know how?

A. It was just a—I don't say he didn't know how. He had operated one before, but, after all, when a new employee comes [32] in, we sort of check them out to our own way of doing it.

Q. Well, now, regarding Mr. Clark's troubles at the station, what caused the greatest amount of trouble, the equipment or the cartridges for the wire recorder?

A. What equipment do you mean?

Q. You stated in this letter to the Commission that:

“Never-the-less the equipment was constantly out of order in some fashion. Either the recorder itself was not in good operating condition or the wire cartridges used were being broken.”

(Testimony of Edward P. Barnett.)

Now, was it the cartridges that were causing the most trouble or the recorder?

A. Well, as I said before, if the entire recorder as a unit is not in working order, to me that means it's out of order, and as to what makes it out of order is something I can't answer.

Q. You didn't check to find out then?

A. I'm no technician. If I tried to check, I couldn't run it down.

Q. Now, referring to Paragraph 2 regarding the broadcast of the rodeo on July 15 and 16, you state that:

"During the broadcast from the rodeo most of the action was to be described from the judges by Mr. Liebman, yet the broadcast from that point was practically lost because of poor control by the engineer." [33]

What is the basis for that statement?

A. A broadcast of that type, we will have our—most of our equipment in a booth to be operated by an engineer. The broadcast from the—in this particular case—from the judges' stand was purely a microphone on the end of a cable. There's no control from that end with the exception of just talking into the microphone.

The control as to the volume and what comes out is controlled by the engineer in the booth.

Q. Well, now, wait a minute. You stated that most of the broadcast from that point was practically lost because of poor control by the engineer.

(Testimony of Edward P. Barnett.)

Now, my question is, what is the basis of that statement?

A. I was listening to the broadcast.

Q. You heard the whole broadcast?

A. Yes.

Q. Did you talk to Mr. Click about that?

A. No.

Q. Is that a serious matter?           A. It was.

Q. Did you—who was the other broadcaster besides Mr. Liebman on that occasion?

A. Mr. Seely.

Q. Did you talk to Mr. Seely about it?

A. No, outside of the fact that I probably mentioned the [34] fact that I wasn't too satisfied with the outcome. I mean, I didn't talk to Seely or anybody else, try to go into any detail on that. There were reasons for it.

Q. Well, now, at the time that this broadcast was held, namely the rodeo broadcast, what was the comparative mike technique or the ability of Mr. Seely and Mr. Liebman as announcers?

A. They both had adequate experience. I'd say an equal amount of experience.

Q. Well, were there any particular faults that you noticed about Mr. Liebman's mike technique?

A. No, he's done a lot of mike work at our station, and the station he was with before.

Q. Well, now, at that particular time, did not Mr. Liebman have a tendency to wander away from the mike so as to make it very difficult for the engineer to pick up his broadcast?



(Testimony of Edward P. Barnett.)

A. Not to my knowledge. That's never been brought to my attention, and I myself have never noticed it.

Q. Did you ever hear the engineers discuss that fact? A. Never have.

Q. Did you ever hear any comments regarding his broadcast of ball games?

A. You mean technically?

Q. Yes. A. No.

Mr. Merrick: That's all. [35]

Trial Examiner Parkes, II: We'll have a short recess.

(Short recess taken.)

Trial Examiner Parkes, II: We'll be on the record.

Mr. Merrick: I have a few other questions.

Q. (By Mr. Merrick): Now, Mr. Barnett, in your absence from the station, does Mr. Bardeen take over the station at the present time?

A. At the present time?

Q. Yes.

A. Mr. Bardeen takes over at the present time.

Q. Was that also true of Mr. Click when he was working there?

A. Ordinarily, the Commercial Manager of the station—well, in our operation at least, takes over in the absence of the station Manager, primarily though that's because he is better informed as to the financial interests of the station than anybody else.

(Testimony of Edward P. Barnett.)

Q. Now, in your answer filed to this complaint you state that Click fired Marion Maston on December 31, 1947, and his right to hire or fire in the absence of the station Manager had never been rescinded.

Is that true?           A. Yes.

Q. In other words, in the absence of the station Manager, he had the right to hire and fire?

A. That particular instance took place, of course, when— [36] I mean, I was not manager at that time.

Mr. Merrick: Just a minute. Mr. Trial Examiner, can we have an answer to my last question first?

Trial Examiner Parkes, II: Will you read the question, please?

(Question read.)

A. He had the right to fire under certain circumstances. He was never given the right to hire, I mean, outright. He could recommend on the hiring, and under certain circumstances, why, he could as chief engineer fire.

Q. (By Mr. Merrick): Well, here in your answer to the complaint, you stated in the absence of the station Manager he had the right to hire and fire.

Was that correct at that time?

A. At the time, Marion Maston was fired?

Q. Yes.           A. Yes.

(Testimony of Edward P. Barnett.)

Q. Now, at that time you were not the station Manager?      A. No.

Q. That is, in December of '47?

A. That's right.

Q. Who was the station Manager then?

A. Robert Reinholdt.

Q. You were the Commercial Manager at that time?      A. Yes. [37]

Q. Now, at the present time when the Manager is out of town, the Commercial Manager takes over, is that correct?      A. Yes.

Q. Is that also true when Maston was fired?

A. Yes.

Q. And Click was allowed to fire this man without consulting you?      A. It was done.

Q. Is that contrary to orders?

A. I don't know at that time whether it was or not. Therefore, I said nothing about it. I mean, that's a matter between the chief engineer and the Manager when the Manager returned. I said nothing about it at the time. I didn't know whether it was contrary to orders or not. Therefore, I didn't say anything about it. So, I can't answer that completely.

Q. Well, now, at the present, in the absence of the station Manager, he would not have the right to fire, is that right?

A. I would say under certain circumstances he would.

Q. He would have the right?

A. Under certain circumstances.

(Testimony of Edward P. Barnett.)

Q. And what circumstances are those?

A. Well, gross disorder, drunkenness, or something of that nature. I would expect him to.

Q. Did it ever occur?

A. It's never occurred since I've been Manager. [38]

Q. Now, you say that he did not have the right to hire, but he had the right to recommend the hiring? A. Yes.

Q. Now, during your tenure as Manager, did you ever consult him regarding what his recommendations might be on hiring? A. Yes.

Q. Do you always follow his recommendations?

A. Yes, we always agree.

Q. In other words, you always accepted his recommendations, is that your testimony?

A. The occasion never came up when his recommendation was different than mine.

Q. Now, Mr. Click made up work schedules for the other technicians, did he not? A. Yes.

Q. And that was done under your direction, is that correct?

A. It came in to me for final approval.

Q. In other words, you had to approve them before it became a final order?

A. Well, yes, anything that goes on in the station, regardless of what it is, I want to know what it is. It's primarily a matter so I can see it and know what is going on.

Q. Did Mr. Click have the authority to give a pay raise to an employee? A. No. [39]

(Testimony of Edward P. Barnett.)

Q. As a matter of fact, did he know what the other employees were getting that were under him?

A. I assume that he did.

Trial Examiner Parkes, II: Was he paid the same amount of pay that the other engineers were?

The Witness: He received the same amount of pay as the man who had a combination job as program director and engineer-announcer.

Q. (By Mr. Merrick): He had the same hours and conditions of employment as the other technicians, did he not?

A. Well, yes, with the exception of chief engineer—well, I mean any department head—I mean things would come up that would require extra work. I mean that's part of the responsibility that goes with the department head, but I'd say normally do schedule hours, yes.

Q. And the extra work you refer to might be a breakdown of equipment?

A. Something of that nature, yes.

Q. Then, as chief engineer, it would be his responsibility to get that back in working order?

A. Yes.

Q. The fact that he was the most capable engineer was the reason that he would be called upon to do that, is that right?

A. Your chief engineer, that's who you consider the most capable man. [40]

Q. He's supposed to know more about it than the other technicians?

A. Yes.

Trial Examiner Parkes, II: What was the dif-

(Testimony of Edward P. Barnett.)

ferential in pay, if any, that existed between Click and the other three, Fields, George and Smith?

The Witness: Well, Fields was the man who was the program director, as well as an engineer-announcer. Their pay was the same.

The other two—offhand, I forget what their pay scale was at that time, but there was approximately, oh, from thirty to fifty dollars a month difference.

Q. (By Mr. Merrick): They were all paid on a monthly basis, were they not? A. Yes.

Q. And Mr. Click performed the same work as the people that he supervised, allegedly supervised, did he not?

A. Yes. He was also an announcer. He announced, too.

Q. He worked with the tools, he made spot announcements, and so forth, did he not?

A. Yes. [41]

\* \* \*

Q. (By Mr. Renoud): Mr. Barnett, at the time of the representation hearing, Mr. Wiener, the Examiner from Portland, your position was that you were in interstate commerce, is that not true?

A. Well, I stated the type of business we did and the organizations that we do business with outside the State. I mean I said that to Mr. Wiener, yes, and as far as the interstate commerce itself, I mean that was—I mean I'm no expert on interstate commerce, and he would be the one to say it is interstate commerce if it is.

(Testimony of Edward P. Barnett.)

Q. Well, what is the primary area that you serve?      A. Jackson County.

Q. Do you serve part of the area in Northern California?

A. No, that is not our primary area at all.

Q. What is the amount of dollar sale volume that you do per year?      A. At the station?

Q. Yes.      A. The gross?

Q. The gross.

A. It will be between fifty and sixty thousand.

Q. Between fifty and sixty thousand and what is the volume of purchases of dollar value?

A. Of purchases?

Q. Yes. [42]

A. Of equipment purchases?

Q. Of equipment, transcriptions, and so forth, all purchases.

A. I would say around five thousand dollars, something——

Q. Well, just approximate.

A. I'm making somewhat of a guess on that.

Q. Now, in your purchases, do you purchase a transcription service?      A. Yes.

Q. Who do you purchase that from?

A. At the present time, we purchase it from World Broadcasting System.

Q. You only have the one?

A. And we have the Standard Transcription Service.

Q. Where do those originate?

A. Southern California.

(Testimony of Edward P. Barnett.)

Q. Do you do any direct purchasing of records from New York?

A. No, I imagine that these transcription services that we subscribe to have offices there, but nevertheless we deal with the Southern California—with the L. A. office.

Q. All the royalties then that you pay for those transcriptions are paid to the Southern California office?

A. That's right.

Q. Now, what national advertising firm do you do business with?

A. The Bible Institute, a religious program, that's the name [43] of the business, Bible Institute, and the same with the Haven Rest.

They are the only national programs that we have at this time.

Q. What are your sales also, like Kelvinator Refrigerator, that you're advertising? Do you have the sale of them over the year?

A. To local merchants, yes.

Q. But it is national goods that you advertise?

A. I can think of very little goods that isn't national advertising. I mean, it isn't made locally, no.

Q. That's the point I'm trying to bring out.

A. It isn't made locally, that is true.

Q. You mentioned using the phone lines, do you use those for remotes?

A. Yes.

Q. What percentage of your broadcasts are remote pickups?

A. One per cent, that is, that would be with



(Testimony of Edward P. Barnett.)

the exception of this Haven Rest and Bible Institute programs, and I'm speaking of broadcasts other than those.

Q. What about your ball games, your sports-cast, and your rodeo, and so forth?

A. Yes, those are remotes. When that particular season—I mean, when certain sport seasons are on, I mean the percentage would be higher than normal. Throughout the year, I would [44] say about one per cent.

Q. Well, for instance, in the summer when the ball games are on, they run what?

A. It's heavy. Those all figure about two or a two and a half hour broadcast.

Q. How many hours?

A. Two to two and a half hours a day.

Q. How many hours a day are you on the air?

A. Sixteen and a half.

Q. You also broadcast basketball games?

A. During the season, yes.

Q. Football games? A. Yes.

Trial Examiner Parkes, II: These games you're speaking of are Oregon games?

The Witness: They're local. They are local games, yes.

Trial Examiner Parkes, II: And you use the phone lines between the site of the sport and the station?

The Witness: Yes.

Q. (By Mr. Renoud): Who is the sponsor for these games?

(Testimony of Edward P. Barnett.)

A. They're local sponsors, local business men.

Q. Do you have any national firms, such as the Associated Oil Company on football?

A. Year before last we did. We didn't last year. It isn't every year that we get those. [45]

Q. What percentage would you say of your advertising was on a national basis—what percentage of your advertising is on national products?

A. You mean products not manufactured locally?

Q. That's right.

A. Well, that's a good question.

Q. It's intended to be.

A. I couldn't even answer that. I don't know what the manufactured products are that are advertised with us outside of—maybe Bear Creek advertises their pears. They're grown locally, but I don't know where these goods are manufactured.

Q. Would you say eighty per cent of your sold time is on nationally advertised products?

A. You mean products not manufactured locally, is that what you mean?

Q. That's right.

A. Well, anything I'd say I'd just hazard a guess. That's all I'd do.

Q. Well, that's all we want is your opinion.

A. I'd say it's a greater percentage of goods that are not manufactured here in the Valley and the area.

Trial Examiner Parkes, II: Who pays for such advertising?

(Testimony of Edward P. Barnett.)

The Witness: Local merchants.

Trial Examiner Parkes, II: That is, for example, an [46] electrical supply store here in town advertises a sale on Kelvinator refrigerators, we will assume, that are made in Michigan, but the local electrical supply company pay you for the time.

The Witness: For the time, yes.

Trial Examiner Parkes, II: Kelvinator in Michigan would not pay for it?

The Witness: No.

Q. (By Mr. Renoud): Is it not a fact that part of your advertising is paid for directly by manufacturers through some advertising firm?

You sell your time to that advertising firm in conjunction with the local merchants, and you are paid by the advertising firm rather than the local merchant?

A. No, possibly the local merchant gets some sort of help on the cost of his advertising, but it's something that's an arrangement between the local merchant and the distributor or the manufacturer. I don't know.

There are cases like that, but we deal with the local merchant.

Q. Most all of your advertising is sold direct to the local merchant and not to any local advertising agency?

A. That's right. We have advertising that is sold through an agency. I mean there are some—a

(Testimony of Edward P. Barnett.)

small portion of our business that does go through an agency, but that isn't local. [47] That isn't our advertising here. Our Bible Institute and our Haven Rest programs, those are agency programs. I mean, that is the—we have a contract with an agency on that, and the agency sends us the check, not the advertiser.

Q. That's the only two that you deal with?

A. No, there are some announcement accounts, two or three announcement accounts that come through an agency. They amount to very, very little. It's just a negligible figure.

Q. On the operation and maintenance of the station, what regulation are you covered by?

A. Will you repeat that, please?

Q. On the operation and maintenance of the station, what regulation are you covered by?

A. Our own regulations outside of the regulations that are given us by the Federal Communications Commission as to the status of our equipment.

Q. Is there any other State regulations you must abide by outside of the F. C. C. regulations?

A. Outside of the type of construction and all that of the building itself is concerned.

Q. As to broadcasts, the F. C. C. is the only regulations you observe?

A. As far as the broadcasts, yes.

Mr. Renoud: That's all I have, Mr. Examiner.

Trial Examiner Parkes, II: I have one question. [48]

(Testimony of Edward P. Barnett.)

On this transcription service purchased from the World Broadcasting Company and other concerns in Southern California, what is the amount of that purchase annually?

The Witness: That will run at the present time approximately twenty-five hundred dollars a year now for the two.

Trial Examiner Parkes, II: That's all I have.

Mr. Merrick: One more question.

Q. (By Mr. Merrick): In other words, Paragraph II of the complaint is not entirely correct, is that right?

Paragraph II states the amount was four thousand dollars.

A. Well, we've dropped one at the present time. We've dropped one library. We had three libraries.

Q. (By Mr. Renoud): Did you say World was in Southern California?

A. There's an office there, yes.

Q. Their main office is in New York, is that not right?

A. I imagine most of them have a main office there.

Mr. Renoud: That's all.

Trial Examiner Parkes, II: Mr. Blair? [49]

### Cross-Examination

\* \* \*

By Mr. Blair:

Q. In connection with your operation of the so-called two programs from California, would you

(Testimony of Edward P. Barnett.)

tell the Trial Examiner and tell me about what percentage of that business of the station is involved in that operation?

A. Those programs are about two or two and a half per cent of our time.

Q. Those come in over the wire?

A. Telephone wire.

Q. Which might be called a rebroadcast over telephone from some other station? A. Yes.

Q. Will you tell me about what amount of time on a percentage basis is spent during the entire course of a year, is spent in broadcasting over a telephone circuit here locally?

A. One per cent possibly.

Q. So what you're telling us, there's actually about three per cent or thereabouts of the company's broadcast time is actually spent in broadcasting what might be termed either hookup or at least wired telephone circuit service? [50]

A. Yes.

Q. And then in the matter of the complaint that was filed and the language contained therein, that is, receives communications, intelligence information by means of instrumentalities of interstate commerce.

Instrumentalities as used normally in the operation of your business is the telephone, is that right?

A. That's correct.

Q. In the same connection which any local merchant or any local home owner might use the tele-

(Testimony of Edward P. Barnett.)

phone as a means of communicating between one party and another?      A. That's right.

Q. So that, naturally, any instrumentality you might use in connection with your business might be determined to be in interstate commerce within the broad meaning or sense is about three per cent of your entire operation?

A. I would say that, yes.

\* \* \*

Q. (By Mr. Blair): I would like for you to give me as nearly as possible a detailed account of what actually happened from the time you first conceived the idea of discharge of one [51] Ralph Click up to the time of the charge being filed.

\* \* \*

A. Well, I had been rather dissatisfied with the services of Click, and his general attitude toward the station since I became manager.

\* \* \*

A. However, even though I felt as though he was not the man that I myself would have hired originally, nevertheless I would not discharge a man unless there were specific reasons for discharge, but at the same time I would be watching that rather closely to make sure that his operation was the type of operation [52] that I wanted at the station.

So, there were many things, such as personality differences and dissension in the station that was overlooked for a long time by myself, overlooked

(Testimony of Edward P. Barnett.)

as far as the discharging of a man for it, but not overlooked in my own mind, as far as what my own opinion of the man and the discharge of his duties were.

So, actually, it was not until specific instances arose that I decided that I definitely was going to make a change and set my mind as to about when I wanted to do it.

These instances were this, as we stated before, while Wallace Clark was employed at the station, Clark and Ralph Click did not get along. There was a personality difference there between the two that—I mean I can't say what the difficulty was. It's just the fact that they didn't get along.

Then, the equipment that Clark used always seemed to be going bad, breaking cartridges more so than we'd ever broken them before, and to me it was the job of the chief engineer to keep the equipment in good repair, but at the same time, as I said, I am no technician. I couldn't put my finger on the trouble. It was just another instance that I kept in mind, kept in the back of my mind. It was something else that was going wrong that I couldn't put my finger on, but I didn't like.

Then, about that time, I noticed—I think it was in the month of June, I received a statement from the Texaco Company. [53] We do business with them as far as our gas and oil purchases for the station are concerned. I received a statement from them along with the signed copies of invoices of the personnel of the station using gas, and I no-



(Testimony of Edward P. Barnett.)

ticed that the gasoline tickets that Ralph Click was using, had used, was a rather high amount. So, I called Click in.

I asked him, I said, "Don't you think that this is quite an amount of gasoline to be using? Have you been doing all this running around for the station?"

He said, "No." And I said, "Well, it looks like you've been buying enough gasoline. Have you used that on station business?"

He said, "No." And I said, "Did you have the authority to use gasoline on private business in amounts like this?"

He said, "No." And I said, "Well, what is the reason?" And he said, "Well, for a long time before you were Manager of the station, I was not allowed to have gasoline for company business, and I felt as though that I was due some back gasoline or some kind of consideration for the time when I used my own car and paid my own gas for the company business."

I said, "Well, you could have come in and discussed it." I said, "Why didn't you do that? If you thought you had something coming, why didn't you do that?"

And he said he didn't think it would do any good, and I told him, "Well, that's just the same as taking cash out of the [54] cash drawer."

And he said, "I know that."

I dismissed him. I mean I dismissed him from the office at that time and let it go at that because,

(Testimony of Edward P. Barnett.)

while actually I should have discharged him on the spot right at that time, I still thought, well, I'll think it over and see what kind of action I should take. So, I did not discharge him at that particular moment.

But a few days after that, this Wallace Clark, who was still employed by the station at that time—this was the latter part of June of '49—Clark came in and wanted to know if it was possible for him to work at the station after eleven o'clock at night.

I told him, "Why, yes, as long as you have work to do, why there's no reason why you shouldn't."

He said, "Well, I just asked because last night I was ordered out of the station." He said, "I was ordered out of the station by the authority of Ralph, Ralph Click."

He said, "I just wanted to make sure whether or not actually I can work here or whether I'm supposed to leave."

I said, "Why, yes, you're supposed to work here if you want to." I said, "I'll talk to Ralph about it and see what the situation is."

So, I went—at that time Ralph was on the board as an engineer-announcer at the time he was on duty, and I went in [55] and I asked Click what the situation was, why it was that he had Wally Clark put out of the station.

He said, "Well, it's always been the policy here that nobody—nobody of the station staff works after after eleven o'clock."

(Testimony of Edward P. Barnett.)

And I said, "I don't believe you're correct in that assumption because anybody on the station staff, as long as they have work to do, anybody can work after eleven o'clock at night even though we go off the air at eleven o'clock."

Well, that followed by a display of temperament. Click jumped out of his chair and started strutting around the room, swearing.

He said, "From this date on, I'll never be responsible for the technical equipment of this station as long as that policy lasts." He said, "From this date on, I'll not be responsible."

The language that he used was rough. His tone was a loud tone. He was swearing. I said nothing more to him at the time with the exception of, "I don't appreciate this childish display of temper." That's all I said to him at that time.

The following day I decided I was going to discharge Ralph on Monday, the following Monday.

Mr. Merrick: What day was that?

The Witness: It was approximately the 24th. It was just before a week end.

Trial Examiner Parkes, II: Of June? [56]

The Witness: June, yes.

So, the next morning, since I had decided to let Ralph go on Monday, I had some business to take care of with Mr. Hamaker, President of the Corporation, and during our conversation, I told him that I was going to replace our chief engineer.

I told him that the situation there was such that

(Testimony of Edward P. Barnett.)

I did not feel he was doing the organization any amount of good as the chief engineer should.

Then, the next day or two—it was on Sunday—Ralph Click went to the hospital for an emergency appendectomy, which meant that on Monday, which was the day I had scheduled him for release, naturally, in my own mind couldn't release a man, discharge a man who was in the hospital.

So, I decided to wait until the man was out of the hospital and back on his feet, couldn't release a man flat on his back. So, I decided to wait until he got back on his feet and was able to get around better.

He came back to work approximately a week after this operation. He came back to work and I told him to take the hours—I mean, work the hours he felt like working and not to overdo it.

About the time that Ralph got back to work, I had another occasion to talk to Mr. Hamaker on some station business, and he asked me at that time why it was that he heard Click back [57] on the air. He said, "Why is that? I thought you were going to release him."

And I said, "Well, I was, but I don't know whether you know it or not but Ralph's been in the hospital. So, I could not do anything about it when he was in the hospital, and didn't feel in my own mind that I should, and, therefore, he's with us until he's physically able to get around better."

I had intended to wait approximately thirty days, or whatever time it was that Click felt better.

(Testimony of Edward P. Barnett.)

The exact date wasn't set after that one postponement on that particular Monday.

And then the latter part of July, I received the notice from I. B. E. W. that the employees—that they had—I guess they were signature cards that the employees had signed and that there would be an election held at the station later, and that any attempts to discharge a man would be held as an unfair labor practice, or words to that effect.

Trial Examiner Parkes, II: Are you referring to General Counsel's Exhibit 2?

The Witness: Yes, I am.

So, when I received that, the first thing I thought of was the fact that, well, I guess that ties my hands and I can't replace my chief engineer now.

So, I talked to—I went to Mr. Hamaker, the President of the Corporation, and he recommended that I get in touch with [58] the Industry Council, Mr. Pat Blair, and talk the situation over with him. He'd understood that Mr. Blair was capable of handling situations such as this.

Mr. Merrick: When was this?

The Witness: That was—let's see, I received this—I probably received this letter on the 26th. It's dated the 25th. I don't know. I signed it. It was a registered letter, whatever that date is.

Mr. Merrick: That's when you contacted Blair, right after that?

The Witness: The next day or two, yes.

And I immediately told Mr. Blair of the situa-

(Testimony of Edward P. Barnett.)

tion, and the first thing I asked him was, "What shall I do in the case of our chief engineer?"

And he said, "Well," he said not to discharge the man until after the election had been held, make sure it's a fair election, and "After the election is held, why, as long as you have cause to discharge a man, why, then the man can be discharged."

So, the election, it went through, and the election was held, and I discharged the man on the 2nd of September.

Q. (By Mr. Blair): At the time you discharged the man, I take it that you signed a paper commonly referred to as his certificate, and what did you put on there?

A. Unsatisfactory. [59]

Q. Now, referring to General Counsel's Exhibit 3, a letter from the Federal Communications Commission, reference in the first paragraph of the letter is made to the fact that you signed his certificate "unsatisfactory."

Would you take note of that first paragraph and tell me what your impression is of the action of the Federal Communications Commission in regard to your signing that certificate?

Mr. Merrick: I'll object to what his impressions are. I think the document is the best evidence.

Trial Examiner Parkes, II: I don't believe that's particularly material.

Mr. Blair: Much has been made of the fact that the certificate has been signed "unsatisfactory" and it's been implied here that might have a lot to do

(Testimony of Edward P. Barnett.)

with future employment of the man and future actions of the Commission, and I would particularly like it to be noted, even if necessary, to read it in the record at this point that the Commission did not recognize the signing of the certificate beyond its apparent original intent, and that was the man was unsatisfactory as an employee, and not that it had anything to do with his license.

Mr. Merrick: Well, he can testify as to what the general frame of mind of what the person was who wrote that.

Is that what you want him to do?

Mr. Blair: Well, to simplify the thing then——

Mr. Merrick: It speaks for itself. [60]

Mr. Blair: For the record, referring to the first paragraph in a communication dated November 28th, 1949, from Washington, D. C., we will call the Trial Examiner's attention to the reference made to the first paragraph as it relates to the question of the word "unsatisfactory" on the license of Ralph Click. [61]

\* \* \*

Q. (By Mr. Blair): Will you tell the Trial Examiner whether or not you at any time attempted to intimidate any one of your employees by a promise or a threat in connection with the election before the National Labor Relations Board? A. I absolutely did not.

Q. Were you ever advised against it?

A. Why, yes, I was advised against it. In my

(Testimony of Edward P. Barnett.)

own mind, it wouldn't be right to do that. I was advised against it in a letter that I received from the I. B. E. W.

Q. It was signed by whom?

A. By Roy F. Renoud.

Q. You took it to mean then that what he said in the letter he meant that he would charge you with an unfair labor practice if you did?

A. Well, that's right. That's why I looked for Counsel right away.

Q. Since the time you have been station Manager, do you know of any revocation of the authority that apparently was granted [62] to Click in the firing of one Marion Maston? A. No.

Q. And during your absence from the station, he was actually in charge of the operation?

A. To the same degree that he always was, yes.

Q. In case of breakdowns, was he the one who would normally be called? A. That's right.

Q. Then, you are telling me that he actually had charge of all the equipment in the station as a licensed operator? A. He did have.

Q. And in charge of that equipment, he would supervise any repairs or adjustments necessary?

A. That's right.

Q. And also that he would set up the schedules for the other employees in the station?

A. That's right.

Q. Even though he took one shift himself?

A. That's right.

Q. Was his shift changeable?



(Testimony of Edward P. Barnett.)

A. Yes, with the others.

Q. That being an arrangement of long standing?

A. Yes, as far as the announcers' setups were concerned, why, his status was the same as the rest. [63]

\* \* \*

Q. (By Mr. Blair): Did I hear you say you had the sanction of Mr. Hamaker, who is President of the Corporation, to discharge Mr. Click?

A. I told him that I decided to discharge him, and Mr. Hamaker said that, of course, that was entirely up to me and he felt as though it would be a good idea himself.

However, he had never before voiced an opinion on the matter until I had actually made the decision to discharge him and then he voiced his opinion on how he had felt on it himself.

Q. And to the best of your knowledge, did Phil George have the same rights that Ralph Click had as a chief operator? A. Yes.

Q. He would be the man who would be called should anything go wrong at the station?

A. Yes.

Q. In the duties of Mr. Click while he was engineer in charge, beyond setting up the work schedules, you testified as to his authority to make purchases.

Does Mr. George still have that authority?

A. Yes. [64]

Q. Is that a normal authority given to what is known as the chief engineer of a radio station?

(Testimony of Edward P. Barnett.)

A. I believe so.

Q. In the station in which you are Manager, you have what are known as combination men, announcers and engineers? A. Yes.

Q. But in each case they are required to hold a license, is that true?

A. At the present time, yes.

Q. Does your program director at any time attempt to do any supervision, to handle any supervision over the technical end of the radio station?

A. Absolutely not.

Q. Is that a well known fact at your station?

A. Yes.

Q. So that, at the present time, regardless of who it might be, but in this particular case, Mr. George, actually your program director has no authority over him in the performance of his technical duties? A. That's right.

Q. Even during your absence?

A. That's right.

Mr. Blair: That's all.

#### Redirect Examination

By Mr. Merrick:

Q. Now, you testified regarding a Texaco [65] credit card.

What were the circumstances arising out of giving a credit card to Mr. Click?

A. When I first became Manager, Click came to me and asked whether or not he could have gaso-

(Testimony of Edward P. Barnett.)

line in the function of station business, and I told him, yes, I felt it was proper he should have, and so I gave him a company credit card.

I told him, you know, to use the credit card on station business.

Q. Now, in his job as engineer, he was required to do quite a bit of traveling, was he not?

A. There were times—I mean there are times in the case of sporting events when the chief engineer travels with the crew a number of miles, yes, that he does, but unless it's on a trip like that, it just doesn't amount to anything. I mean, the driving doesn't.

Q. How far is it from Ashland to the ball park here at Medford?

A. About twelve miles.

Q. And you broadcast those games every day in the summer that the Medford ball club is at home, do you not?

A. That they are home, yes.

Q. And Mr. Click was required to be there, was he not?

A. He was not required to be there, no.

Q. Well, he was there though on company business as a matter [66] of fact, was he not?

A. Yes. I mean there was equipment there naturally that he was responsible for. He was not there at the games necessarily, he was not required to be there.

Q. Now, prior to your giving him this credit card, there had been some dissatisfaction over the fact that these people had to use their cars and they

(Testimony of Edward P. Barnett.)

were not reimbursed for the mileage, is that not true?

A. You mean the announcers and engineers?

Q. The announcers and engineers.

A. Actually the only complaint I heard is the one that Ralph gave me when Ralph came in and asked me about a credit card.

Q. Well, now, when you found out that Ralph had been using some of this gas for his own personal use, and he frankly admitted to you that he had been doing that, did he not?

A. That's right.

Q. And that occurred when?

A. It was in June, I think, the first part or the middle of June, right in there some place.

Q. And didn't he tell you that for two years past he had been using his own car and his own gas and he felt that he had it coming to him?

A. Yes, he did.

Q. You didn't dispute that, did you?

A. That was something that happened before I was Manager. [67]

Q. Now, when did Mr. Click know that Mr. Clark actually was an employee of the radio station?

A. Well, my goodness, the day he was hired. It's a small organization.

Q. Well, he was a free lance man, was he not?

A. He was an employee of the station. He was not free lance.

(Testimony of Edward P. Barnett.)

Q. Did he have any programs besides this "man on the street" business?

A. No, there were some other programs that he sold. However, that was a program that he operated himself.

You see, he was a salesman for the station and operated this program, but he sold accounts other than the accounts for his own particular program.

Q. Well, now, on this "man on the street" deal, he sold that as his own, did he not? He bought the time from the company? A. He did not.

Q. He did not? A. He did not.

Q. Do you know if Mr. Click knew if he did not?

A. Mr. Click should have been aware of the station policy. It would be just poor business to do anything other than the way we worked with Wallace Clark.

Q. And you stated that after Click came back from his appendectomy, you wanted to wait until he got back in shape before you fired him? [68]

A. That's right.

Q. Do you know the amount of work that the rodeo broadcast entailed? A. I did.

Q. And that's rather strenuous work for a man who had just been operated on, was it not?

A. That is right. That is why I asked Mr. Click if he felt like handling it.

When Mr. Click came back from the hospital, I told him to set his own hours.

(Testimony of Edward P. Barnett.)

Q. That was about one week after he had been out of the hospital? A. That's right.

Q. And he was required to go out to the ball park and climb up and down the barricades, stringing wires, was he not?

A. He was not required to.

Q. He did though, didn't he? A. He did.

Q. Which indicated that he was in shape?

A. In his own mind. I mean I'll give him credit for that. I mean—my goodness, but he'd still only been out of the hospital a week.

Q. Now, were you having trouble with Click all the way along until you received the letter from the union?

A. The instances that I stated. [69]

Q. How was his conduct from July 25th, the date of the union letter, until the time that you fired him? A. He handled his job well.

Q. His attitude toward the job improved?

A. There was—as far as the technical control, as far as our equipment was concerned, we had no trouble.

Q. Well, actually, your main trouble with him was the fact that you didn't get along with him, wasn't that right?

A. No, otherwise, I would have fired him long before. I mean I realize I'm only human, and there are people that I don't get along with, but that doesn't mean that I'm right and they are wrong.

Q. Well, as far as his technical knowledge was concerned, he really knew his business, didn't he?

(Testimony of Edward P. Barnett.)

A. He had a knowledge, yes.

Q. In other words, when you wrote to the Board, as shown by General Counsel's Exhibit 4, you stated that he was fired for incompetence.

That wasn't correct, was it?

A. It was correct. He had the knowledge. Whether he applied that knowledge is another matter.

Q. Now, you refer to the wilful neglect of duty in General Counsel's Exhibit 4.

Just when did he wilfully neglect his job?

A. When he did not maintain the equipment of Wallace Clark; [70] when he made the statement to me that he would no longer be responsible for the equipment at that station. That is wilful neglect.

Q. That was the only instance then of wilful neglect?

A. That is the only instance that I say I can pin down. However, it was things like that that brought to light many things that had gone on that offhand I can't recall, but that just sort of brought them to light, and I felt, well, possibly my fears at that time are correct.

Q. Now, right after you received the union letter of July 25th, you say you contacted Mr. Blair relative to Click?

A. Yes.

Q. And you discussed the situation thoroughly, is that your testimony, as to whether or not you should fire him?

A. Yes.

(Testimony of Edward P. Barnett.)

Q. And Mr. Blair, acting as your Counsel, told you not to fire him until after the election?

A. That's right.

Q. And Mr. Blair said nothing about Mr. Click being supervisor at that time, did he?

A. Well, actually we hadn't—it broke rather suddenly, I mean. I mean, something I didn't expect, and as far as my first conversation with Mr. Blair, we didn't go into a lot of detail if I recall.

Q. Well, Blair said to let him go after the election, didn't [71] he? Let him vote in the election and then fire him?

A. No, he said not to fire him until after the election to make sure that we have a fair election.

Q. Well, there was no challenge made at the election as to his right to vote, was there?

A. At the time of the election, no.

Q. Now, in these shifts that Mr. Click worked, did he ever have the right to change the shifts of the other people that were working in the Engineering Department?

A. Well, he didn't have the right to change an entire shift. He had the right to change the hours in the shift somewhat, in other words, to start earlier or later, or something like that.

As far as fitting the shift into the sixteen and a half hour schedule—as far as taking a man off nights and putting him on mornings, and all, why, that is something that I ordinarily like to be consulted on.

But, as far as working the details, or stretching



(Testimony of Edward P. Barnett.)

a shift here, or shortening one here to make the day complete, why, he did have authority to do that.

Q. Now, these purchases that he made, those were merely routine purchases, were they not?

A. As I say, they are in normal maintenance.

Q. And primarily, his job was connected with the supervision of machinery and equipment, was it not, making routine repairs and making sure that the station remained on the air? [72]

A. He was also responsible for the men under him because, after all, they are also—the time they are on duty, they are responsible for certain equipment. Therefore, his responsibility was not only for the equipment, but for those men, too.

Q. Well, primarily, his responsibility was the equipment, was it not?

A. Well, I wouldn't say primary unless it's qualified somewhat. Either one is important. It depends on what we're looking at at the time.

If we're discussing the personnel situation, then it would be primary at that time.

I won't say that one has much primary importance over the other.

Q. The program director is not a supervisor, is he?      A. No.

Mr. Merrick: That's all.

Q. (By Mr. Renoud): Mr. Barnett, during your tour as Manager there with Mr. Click being chief clerk, did you lose any time on the air due

(Testimony of Edward P. Barnett.)

to faulty operation and breakdown of the equipment due to not the proper maintenance on it?

A. When there were technical troubles—I mean, all stations have some technical troubles, and there are times when they are off the air for this and that.

I recall no time when we were off the air that I didn't go to Click and say that we were off the air due to your neglect, [73] but after all, once again I am no technician.

Q. Were you ever off the air outside of a power failure during the two years?

A. Well, it wasn't two years, I mean, that I was Manager.

Q. Well, from the time that you were Manager till the time you discharged him.

A. I don't recall. I mean, if we were, it was a small item. Otherwise, I would remember.

Q. Have you ever had any F. C. C. citations?

A. At the station?

Q. At the station.                      A. Yes.

Q. Due to Mr. Click's maintenance of equipment?                      A. No.

Q. Has the station been down due to failure since Mr. Click left?

A. There is nothing that has gone wrong any more so than—as I say, there are times of power failures and what-not that things come along. It's just the same as it's always been. If it was normal before, it's normal now.

Q. Well, you haven't been off the air any more

(Testimony of Edward P. Barnett.)

since he left due to mechanical failure than you were before?      A. Absolutely not.

Q. Did you ever during the routine inspections of the F. C. C. get any citations that the maintenance was not kept up properly [74] by Mr. Click?

A. No.

Q. What were the citations you spoke of? What were they for?

A. We had—we are required by the F. C. C. to keep a political file, and the day the F. C. C. inspector came through, I was out on business and this file happened to be in my—I mean this political file happened to be in my files, and I had the file locked and he couldn't see it, and the girl in the front office didn't know where the extra key was for my files so that he could look at it, the political file.

Q. That's the only citation you received?

A. Yes. [75]

\* \* \*

### PHILIP R. GEORGE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Merrick:

Q. What is your full name, Mr. George?

A. Philip R. George.

Q. And your address?

A. 15 Wynburn, Ashland.

(Testimony of Philip R. George.)

Q. Now, what is your occupation?

A. Chief engineer of Radio Station KWIN.

Q. And how long have you been chief engineer of KWIN?

A. Since the time Ralph Click was released, approximately a year. [76]

\* \* \*

Q. Did Mr. Barnett question you regarding your attitude towards the union?

A. I don't remember specifically any specific conversation with Mr. Barnett about the union. It was discussed at length with just the members of the station at the time. I'm certain that I very likely spoke to all of them about it.

Q. Do you recall his asking you how you felt about the union, and you told him you didn't consider them as Santa Claus?

A. Yes, I do remember that statement.

Q. And shortly after that conversation, was the subject of Ralph Click brought up by Mr. Barnett?

A. Would you state that again?

Q. Shortly after that conversation that you had with Barnett regarding the union, do you recall the subject of Ralph Click being brought up? That is, in connection with the union?

A. No, I don't recall.

Q. You don't recall making an affidavit, do you, to that effect? Who contacted you regarding the—or were you contacted regarding the union?

A. Regarding joining the union?

Q. Yes. [77]

A. Yes.

(Testimony of Philip R. George.)

Q. Who contacted you? A. Mr. Click.

Q. Was Mr. Click successful in getting you to join the union? A. No.

Q. Did you vote in the N. L. R. B. conducted election?

A. You mean the one that was held at the station?

Q. Yes. A. Yes.

Q. And you now have the job occupied by Mr. Click, is that right? A. Yes.

Q. Now, do you recall the rodeo broadcast that was made?

A. I recall that there was a rodeo broadcast made.

Q. Were you working at the station at that time?

A. As I remember, I was at the station at the time.

Q. Did you ever hear any comments from Mr. Barnett regarding the broadcast? A. No.

Q. No adverse comments at all?

A. I remember no comments at all about the broadcast.

Mr. Merrick: That's all.

### Cross-Examination

By Mr. Blair:

Q. Mr. George, you related about some conversation around the station just previous to the election, or [78] some time previous to the election.

Was that among the employees themselves?

(Testimony of Philip R. George.)

A. Yes.

Q. Was that in a meeting with Mr. Barnett, or was that separately with the employees?

A. Well, if you define employees, I mean, as I remember it, it was generally discussed with everyone in the station, at the station and away from the station.

Q. Well, were the operators or announcers just generally talking about the thing in just general conversation? A. Yes.

Q. Did Mr. Barnett ever talk to you, specifically yourself, about the situation?

A. Not as I remember, no.

Q. So, as far as you recall, he never at any time made any promise to you of any kind? A. No.

Q. He never made any threat to you that if you joined the union, he might do something about it?

A. No.

Q. So, as far as you're concerned, would you say that when you had the opportunity of voting at the election, there wasn't anything to stop you from exercising your own free prerogative?

A. There was nothing except my own feelings on the matter.

Q. And nobody asked you how you voted? [79]

A. No.

Q. Certainly not Mr. Barnett?

A. No, Mr. Barnett, previous to the election, in some of our conversations—I can't recall the specific conversations or when it was, but I know I was left

(Testimony of Philip R. George.)

with the feeling that it would be a free election, and I should vote as I felt.

Q. But at no time did Mr. Barnett attempt to influence you one way or the other? A. No.

Mr. Blair: That's all.

### Redirect Examination

By Mr. Merrick:

Q. Mr. Barnett knew how you voted, didn't he?

A. As I understand, no one knows how I voted.

Mr. Merrick: I have no further examination of this witness.

Q. (By Mr. Renoud): Mr. George, previous to going to work out there at the station, where was your previous radio experience?

A. I had approximately four years of various communications experience in the Army. I attended an Army Air Force radio communications school.

Then, after being discharged from the Army, I went approximately a year and a half to Multnomah College, and went through their regular course and their advanced course, and I [80] had no commercial experience prior to coming to WKIN. I had some amount of amateur radio experience, and that just about takes care of it, the experience I had.

Q. Did you do any maintenance at KWIN?

A. No, I assisted Mr. Click in quite a degree whenever I could, but I did no maintenance on my own. It was entirely under the supervision of Mr. Click.

(Testimony of Philip R. George.)

Q. Just to clear this in my own mind, you never did any commercial maintenance at any broadcast station prior to becoming chief engineer?

A. That's correct.

Mr. Renoud: That's all.

### Recross-Examination

By Mr. Blair:

Q. You said you never did any commercial?

A. None, sir.

Q. You mean you had done so under the supervision of Mr. Click? A. Yes.

Q. It wasn't required of you at any of these stations except under his supervision?

A. No, it wasn't required.

Q. In fact, we better put it this way then, that it wasn't allowed that you do any except under his supervision?

A. I didn't feel it would be allowed, no.

Mr. Blair: That's all. [81]

Trial Examiner Parkes, II: Anything else?

### Further Redirect Examination

By Mr. Merrick:

Q. Who hired you when you went to work?

A. Mr. Robert Reinholdt.

Q. Did he interview you? A. Yes.

Q. Click didn't interview you, is that right?

A. That's right. [82]



WILLIAM A. SELLENS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Q. (By Mr. Merrick): What is your full name, Mr. Sellens? A. William Alfred Sellens.

Q. And what is your address?

A. 148 Ohio Street, Ashland, Oregon.

Q. Were you at any time employed by Station KWIN? A. I was.

Q. Are you presently employed there?

A. Yes, sir. I mean, no, sir.

Q. When did you work there?

A. Well, I started there—I don't remember the year, when Mr. Reinholdt was first manager up there, when I started. I quit a year ago the first of last August.

Q. In other words, August 1, 1948?

A. Yes.

Q. What was your job?

A. I was janitor, night watchman, kind of a combined job. [83]

Q. What hours did you work?

A. From eleven o'clock in the evening till 6:30 in the morning.

Q. Were those the hours that the station was not in operation?

A. Yes, sir. Well, on Sunday it was closed an hour earlier.

Q. But generally the station closed at eleven at night? A. Yes.

(Testimony of William A. Sellens.)

Q. And opened at 6:30 in the morning?

A. Yes, sir.

Q. And you were the night watchman?

A. Yes, sir.

Q. Now, did you have any instructions as to who was to visit the offices while you were working?

A. They told me when I went to work nobody but the manager and the engineer after closing hours.

Q. That's after eleven o'clock at night?

A. Yes, sir.

Q. And who gave you that instruction?

A. Mr. Reinholdt's the man that told me.

Q. And did you have those instructions when Mr. Barnett was manager?

A. There was never any change made.

Q. Do you recall Mr. Clark visiting the offices after eleven o'clock one evening? [84]

A. He was in the office, yes.

Q. Do you know what he was doing?

A. He was telephoning, typing, one thing and another like that.

Q. Did you ask him to leave?

A. I told him I'd have to request it, yes. That was my orders.

Q. And what did he say?

A. Well, he seemed to get a little bit peeved about it, but he went. That's all I can tell you. He left.

Q. Was Mr. Click around there that evening?

A. He was.

Q. He was?

(Testimony of William A. Sellens.)

A. Yes, he had been around there.

Q. Did you inform Mr. Click that Clark was around?      A. Yes, I told him.

Mr. Merrick: You may examine.

Cross-Examination

By Mr. Blair:

Q. Did you say that this occurred at eleven o'clock or after eleven o'clock?

A. After eleven o'clock.

Q. Mr. Click was still on the job at that time?

A. He was in there to do some work.

Q. Mr. Click had come to do some work?

A. Yes, sir. [85]

Q. Have you ever received any instructions from Mr. Barnett to tell people that they should not be there after eleven o'clock at night?

A. No, I never got any instructions from him.

Q. So, you merely assumed that anything you had received from the prior manager carried over to this?      A. Yes, sir.

Q. Well now, do I get this straight?

You are the one that told Mr. Clark to leave the station and not Mr. Click?

A. Well, I don't know what Mr. Click told him, but I told him I'd have to require him to because that was my orders.

Q. So you have no knowledge directly then that Mr. Click didn't tell him the same thing?

A. No, I have no knowledge.

Mr. Blair: That's all.

(Testimony of William A. Sellens.)

Mr. Merrick: Thank you, Mr. Sellens.

Trial Examiner Parkes, II: I have one question.

When Mr. Merrick was questioning you, he asked, according to my notes, whether you worked at the radio station until August 1, 1948.

Did you mean 1948 or 1949?

The Witness: A year ago this last August, when I was let out.

Trial Examiner Parkes, II: This is August, 1950, now. [86]

The Witness: Yes, it would be '49. It was a year ago this last August.

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### DONALD E. SMITH

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Merrick:

Q. For the record, what is your full name, Mr. Smith?      A. Donald Eugene Smith.

Q. And your address?

A. 103 Jeanette Street, Medford.

Q. And what is your occupation?

A. Combination announcer-technician.

Q. And where are you employed?

A. KWIN, Ashland.

Q. And how long have you been a combination radio announcer and technician?

(Testimony of Donald E. Smith.)

A. Since August, or rather April 15th, in [87] '49.

Q. To the present date? A. Yes.

Q. You've had the same job all during that period? A. Yes, I have.

Q. Who hired you for your job?

A. The manager, Mr. Barnett.

Q. Now, during your employment at KWIN, have you ever been contacted regarding—by anyone regarding the signing of a union card, or union authorization card?

A. Yes, Ralph Click and Charles Fields both approached me on it.

Q. Do you recall when that was?

A. Well, after I'd been working there about three months, I would say. I don't recall the date.

Q. What was the conversation?

A. Well, they were both for joining the union and they thought I should go along.

Q. Well, did you go along with them?

A. Yes, I did.

Q. Now, did you subsequently vote in the Board conducted election? A. Yes, I did.

Q. Have you been present during all of the prior testimony? A. Yes, I have.

Q. Did you hear Mr. Barnett testify that intimidation and [88] coercion had been used regarding your vote in the election? A. Yes, I did.

Q. Was any pressure brought to bear on you by Mr. Click as to how you should vote in the election?

(Testimony of Donald E. Smith.)

A. I don't believe there was any direct pressure that was brought to bear.

Q. Well, what did he say to you to get the vote for the union?

A. Well, I don't think he said anything except to vote for the union. He told me that Mr. Barnett had talked to him. They were going to cut down on their staff and couldn't afford four technicians, and I was the youngest one there. So, it would be me.

Q. So, that was the extent of his sales talk?

A. Well, no, that wasn't the extent of it, but they were all for the union. We thought it would help us a lot and help us to get other jobs. As far as any information, I think that was the extent of it. That's all I recall.

Q. Prior to your voting in the election, were you questioned by Mr. Barnett as to your views on the union?

A. Yes, I was.

Q. Well, what was the conversation with Mr. Barnett?

A. Well, he asked me what I thought of the union and how I thought I would benefit by it, belonging to it, and, oh, we just discussed unions in general, and he told me the situation of the [89] station, I mean their financial situation.

Q. That they couldn't afford to pay more?

A. Yes.

Q. When did that occur in relation to the vote?

A. Well, it must have been after he had gotten his notice there was to be an election and before the election took place.

(Testimony of Donald E. Smith.)

Q. Was it shortly before the election?

A. Yes, I would say it was.

Q. And did you have any other conversations with Barnett about the union before the election?

A. Yes, one day he brought a letter in, I believe it was from an industrial labor council or something, advising us not to join the Portland local.

Q. What were the arguments advanced in the letter, do you recall?

A. Well, by joining a certain union, which we did, or rather if we did, it would be turning our powers to bargain over to the Portland local and we wouldn't have any say in the union at all.

The people up there would make the laws and we would have to abide by them.

Q. Do you know who that letter originated with?

A. I think it was Mr. Blair.

Q. Now, during these conversations, was anything said about Mr. Click?

A. Yes, there was. Ed said that if I voted against the union [90] I wouldn't have anything to fear from Mr. Click because he wouldn't be there.

Q. When you say Ed, you mean Mr. Barnett?

A. Mr. Barnett.

Q. This statement occurred at the time you were shown this letter from Mr. Blair?

A. Yes, sir.

Q. And that was prior to the election?

A. Yes, before the election.

Q. Now, how did you get along with Mr. Click?

A. Well, I got along with him all right.

(Testimony of Donald E. Smith.)

Q. Do you recall Wally Clark working at KWIN?

A. Yes, he served there about the same time I did.

Q. In your job as a technician, did you ever have an opportunity to work on his program?

A. I run it.

Q. You ran his program?

A. From the console or the board.

Q. What was the quality of his programs?

A. Usually pretty poor, but all of our recordings are fairly poor.

Q. In general, what was wrong with Clark's program?

A. Well, I don't know. From my point of view, it was—he was interviewing people, as a rule. He'd get right up in front of the mike and shout into it, and a lot of times you wouldn't [91] hear that very good, a lot of background noise, trucks passing, machinery working.

Q. Do you recall any trouble that Clark had with cartridges for the wire recorder?

A. I know that we did lose a couple of shows on account of that.

Q. Do you know how those wire recorders work with relation to those cartridges?

A. I know how to run them.

Q. Is the cartridge something that can be repaired readily?

A. As far as I know, you have to send them back to the factory to have them fixed.



(Testimony of Donald E. Smith.)

Q. Well, is it a delicate instrument?

A. I think the reason we broke them—I've broken them rewinding them.

Q. Well, do you recall that Mr. Clark broke an abnormal number of them, or was it a small number, or what?

A. I really don't know.

Q. While working as a technician, did you ever have an opportunity to work on programs that Doyle Seely and Liebman worked on?

A. Yes, I did.

Q. What programs were they?

A. Well, ball games, road baseball games.

Q. Is there any difference in the mike technique of these [92] two men?

A. Well, quite a bit.

Q. What was it?

A. Seely was a lot easier to run the gain on. Ned seems to roll all over the place. He's kinda weak at times and you have to bring it up to get him.

Q. When you say "run the gain"?

A. Well, the modulator transmitter—they give us a certain signal, and we work it on the transmitter at the station, and when you bring it up to get a loud voice, you get a lot of back noise.

Q. What could cause this loss in the volume?

A. Well, being too far from the mike and not talking loud enough.

Mr. Merrick: I'd like to inquire of the Trial Examiner regarding the vote made by the men in elections.

Is it permissible to ask that question as to how he voted?

(Testimony of Donald E. Smith.)

Trial Examiner Parkes, II: It makes no difference to me.

Mr. Merrick: I assume that that would be with the parties who voted.

Trial Examiner Parkes, II: If he didn't want to tell, I wouldn't demand that he tell.

Q. (By Mr. Merrick): Do you have any objection to answering how you voted in the election?

A. None at all. Everybody else knows it. I voted for it. [93]

Mr. Merrick: That's all.

#### Cross-Examination

By Mr. Blair:

Q. Mr. Smith, in relating the conversation which you had with Mr. Click and Mr. Fields in connection with whether you should or should not join the union, you related some of the conversation, but apparently there are a few things, at least I seem to be confused about them.

One is that you were given to understand that you were the youngest employee in point of service, and there was going to be a reduction in staff.

Was there any promise made to you at the time by Mr. Fields or Mr. Click, primarily by Mr. Click, that anything would happen to you if you poined the union, a promise of any kind?

A. None at all.

Q. You weren't promised by Mr. Click that, even though you were the youngest employee, that you'd

(Testimony of Donald E. Smith.)

be given a chance to stay on the job if you joined the union or voted for the union?

A. None at all.

Q. He made no promise to you of any kind?

A. He made no promise to me.

Q. Mr. Fields made no promise to you of any kind?      A. None whatsoever.

Q. Well, tell me this: Did Mr. Barnett ever make any promise to you?

A. Mr. Barnett never made any threats or promises whatsoever. [94]

Q. Of any kind to you in regard to the election to be held by the National Board?      A. No, sir.

Q. Was there anyone else around the station who might have talked to you about elections?

A. Well, I think we all discussed it, but nobody brought any pressure to bear on us.

Q. Well, did anyone at any time attempt to get you in a corner and by any means directly promise or force you into exercising your vote?

A. No, I don't believe so.

Q. And practically everything that happened around the station during the course of this was merely a general discussion, more or less, people passed comment, is that right?      A. Yes.

Q. Nobody promised anything, or nobody threatened anything?      A. No, that's correct.

\* \* \*

(Testimony of Donald E. Smith.)

Redirect Examination

By Mr. Merrick:

Q. Shortly prior to the election, you did have a conversation with Mr. Barnett regarding the union, did you not? [95]      A. Yes, we did.

Q. And he questioned you as to how you felt about the union, is that right?

A. That's right.

Q. And then I believe you testified that you had another conversation in which he said that, if you voted against the union, you wouldn't have to worry about what—or about working under Ralph Click?

A. Yes, I think he thought Ralph Click was threatening me, or something. He said I wouldn't have to worry either way because whichever way it turned out, I wouldn't have to worry about Ralph Click.

Mr. Merrick: That's all.

Recross-Examination

By Mr. Blair:

Q. He didn't by implication say that anything was going to happen to Click because of this situation, but merely that you didn't have to worry how you voted as far as Click was concerned, is that right?

A. I didn't have to worry either way.

Mr. Blair: That's all.

Trial Examiner Parkes, II: Would you please

(Testimony of Donald E. Smith.)

tell me again exactly what Mr. Barnett told you in reference to the election and to Mr. Click?

The Witness: Well, Mr. Barnett said that he didn't feel the station could afford another pay raise at that time, and [96] he said that I'd have to make up my own mind as far as the union vote was concerned, and he said that if I voted against the union I wouldn't have to worry about the chief engineer, Mr. Click, because——

Trial Examiner Parkes, II: And that is the substance of the conversation?

The Witness: As near as I can remember it.

Trial Examiner Parkes, II: Any other questions?

### Further Redirect Examination

By Mr. Merrick:

Q. Did he question you as to your attitude toward the union?

A. Well, he asked me what I thought about them.

\* \* \*

### CHARLES B. FIELDS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Merrick:

Q. What is your full name, Mr. Fields?

A. Charles Bruce Fields.

(Testimony of Charles B. Fields.)

Q. Your last name is spelled (spelling) F-i-e-l-d-s? [97] A. Right.

Q. And what is your address?

A. My present address is 1790 Archer Drive, Medford.

Q. And what is your occupation?

A. At present, operator-announcer of Radio Station KMED in Medford.

Q. How long have you been at KMED?

A. Since March of this year.

Q. And that's March, 1950, right?

A. Yes.

Q. Prior to that, where were you employed?

A. Employed as program director-operator-announcer at KWIN in Ashland.

Q. And what was your full title again?

A. Program director-operator and announcer.

Q. And how long were you program director-operator-announcer there at KWIN?

A. Well, the program director part, I had been program director about a year and three quarters, I'd say. I'd been employed by that station since September 16th of '46.

Q. And you started to work there prior to Mr. Click? A. Yes.

Q. What was your job when you started there?

A. Just straight operator-announcer.

Q. In other words, you were in the technical department? [98] A. Yes.

Q. After Mr. Click came there, did you work with him in the Engineering Department?

(Testimony of Charles B. Fields.)

A. Yes, I did.

Q. How did Mr. Click perform his duties as an engineer?

A. I thought he made a good chief engineer. He was very good.

Q. During the time that you were there up until March of 1950, did you ever hear any complaints by Mr. Barnett as to how he performed his technical duties? A. No, I never did.

Q. Do you know whether Mr. Click ever hired or fired employees? A. No, I don't know.

Q. Were you ever told that Mr. Click was your supervisor?

A. No, not in so many words. It's always understood at a small station that the operators and technicians work under the chief engineer.

Q. Did he supervise the work? A. Yes.

Q. And was that the extent of his supervision over you? A. That's all.

Q. Did he have authority to change your hours of employment? A. No, not as far as I know.

Q. In other words, his supervision was directed to equipment, [99] not to employment, the employee?

A. The equipment and the way the operator worked with that equipment.

Q. Now, there's been a lot of testimony here regarding this N. L. R. B. election.

Did you vote in that election?

A. Yes, I did.

(Testimony of Charles B. Fields.)

Q. Do you have any objection to stating how you voted?

A. Not a bit. I voted for the union.

Q. And prior to the election, were you questioned by anyone as to your views regarding the union?

A. Yes. Mr. Barnett questioned me about the union.

Q. When did he question you?

A. About a week and a half before the election.

Q. What was the conversation?

A. Oh, just asking me what I thought about the union.

Q. What did you tell him?

A. Well, I—actually, it goes back to my home town of Portland. I received several jobs through the union in Portland from their—I forget the latest title—secretary in the office.

Q. Of the union office?

A. Yes, the union office in Portland. I received several jobs through her, and also I received notification of this job opening in Ashland at that time in '46. At that time, in fact, [100] between the two of us working together, I sent down application blanks to Ashland to sign up with the station there at that time.

Q. Well, did you tell him that you were in favor of the union?

A. Yes, I did.

Q. What did he say to that?

A. Well, he hoped that I'd keep my views with the station and their ideas.



(Testimony of Charles B. Fields.)

Q. Did he amplify that statement at all?

A. No.

Q. Was anything said about Mr. Ralph Click in this conversation?

A. No, not during that conversation before the election, no.

Q. Well, did you have any conversations with Mr. Barnett after the election regarding Click?

A. Well, the remark was passed that Mr. Barnett wanted a smooth running operation and wanted to eliminate trouble.

Q. Did he refer to Click by name?

A. No, not by name, but to me it was a reference to Mr. Click.

Q. When did that occur in relation to the election?

A. That was after the election.

Q. Was it after Mr. Click had been fired?

A. Yes.

Q. How soon do you know? [101]

A. Oh, I'd say about two weeks.

Q. Now, while you were employed there, do you recall working with a man by the name of Wally Clark?

A. Yes, I do.

Q. Did you ever hear any complaints regarding Click's failure to service Clark's equipment?

A. No, I haven't.

Q. Did you have an opportunity to work as a technician while Clark's program was on the air?

A. Yes, I did.

Q. How did you find those programs?

(Testimony of Charles B. Fields.)

A. The programs were very poor. I'd call them lousy.

Q. What was wrong with them?

A. From a technician's standpoint, the recording equipment he used was being operated improperly. There was a flashing indicator on the recorder itself, which was just supposed to flash occasionally from the sound of the actual wire recording itself. He was over-modulating, flashing that light too much. The result was a harsh program in the voice itself or whatever was picked up.

Q. Do you recall any trouble over cartridges that Clark had?

A. Yes, he'd broken quite a few. I'd seen them stacked up about the room.

Q. Do you know what was causing these broken cartridges?

A. Well, it could happen. I don't know whether it was on [102] his part or not.

You see, you can start the wire recorder and then insert the cartridge, and it will break the wire, chances are. It should be inserted into the recorder, and then the whole recording equipment started. That reduces the breakage.

Q. Can those cartridges be repaired at the station?

A. No, they have to be sent back to the factory.

Q. Is it a fairly delicate instrument?

A. Yes, I'd say it is. The wires used in the recording equipment are a little larger than a human hair.

(Testimony of Charles B. Fields.)

Q. Do you recall the rodeo broadcast in July of '49 in Medford? A. Yes, I do.

Q. Did you listen to that on the air?

A. I heard it at home.

Q. Did you hear the whole broadcast?

A. A portion of it.

Q. How was the broadcast?

A. Sounded good to me, what I heard.

Q. Well, from a technician's standpoint, was there anything wrong with it?

A. No, not at all.

Q. Was the voice level of the two men about the same? A. About the same, yes.

Q. And that's the responsibility of the technician? [103]

A. That's both the responsibility of the technician on duty at the rodeo or wherever the broadcast originates and of the operator on duty at the station.

Q. Now, do you recall working with Mr. Liebman and Mr. Seely? A. No.

Q. You never worked with those two people?

A. Let's see now. One time I worked with Doyle, I believe, on a ball game.

Q. Generally though, you didn't work with them?

A. No.

Mr. Merrick: Your witness.

### Cross-Examination

By Mr. Blair:

Q. In your conversations with Mr. Barnett, do I get it clear that at no time did he ever make any

(Testimony of Charles B. Fields.)

promise to you of any kind in connection with this union election?

A. There were no promises made.

Q. He never made any threat to you of any kind?

A. No.

Q. And even though you admitted to him that you favored the union, he never took any reprisals against you for that, did he?

A. No, none at all.

Q. Tell me something else, Mr. Fields, in your job there at the station at the time referred to by Mr. Merrick when Mr. Clark was there, were you on the job all the time that you could possibly know what was going on, that is, in relation to Mr. [104] Clark's operation? Were you on the same shift with him at all times?

A. The recording equipment he operated, made recordings in downtown Medford, the cartridge was usually shipped back to the radio station and inserted in our machine.

Q. Did you always operate that machine when they came in?

A. We were on those programs about two months.

Q. You mean to the exclusion of everyone else?

A. Yes.

Q. And you were the only one that ran those programs, and the only one who knew anything about it?

A. I was the operator on the control board.

Q. Was there any friction between you and Mr. Clark?

A. No.

(Testimony of Charles B. Fields.)

Q. No animosity there that might lead you to say his programs were lousy?

A. No, I rather like the boy.

Q. Would the same thing have happened to anyone else who might have been making transcriptions out on the street or wherever else he was making them?

A. No, I'd say it's rather doubtful. Others would be rather careful. [105]

\* \* \*

Q. (By Mr. Blair): Do you know of any situations where others than Mr. Clark to your own knowledge made bum transcriptions or lousy, as you would call them? A. No.

Q. Mr. Clark in your estimation was the only one who made lousy transcriptions?

A. That's right because the program was taken over by Phil George after Mr. Clark left and, being a technician, he knew how to run the machine much better.

Q. Any others?

A. No, not to my knowledge.

Q. So then, the only choice you had was to examine the difference between Mr. Clark and Mr. George? A. Correct.

Q. And in your estimation Mr. George never made a bum transcription, right?

A. Well, perhaps portions, but not so thorough a job as Mr. [106] Clark.

Q. Tell me, how do you account for the fact that

(Testimony of Charles B. Fields.)

this testimony of yours that Mr. Clark broke all these—what did you call them?

A. Cartridges.

Q. Cartridges. Is it your own personal knowledge that Mr. Clark broke all those?

A. I'd seen them.

Q. Is it possible that someone else might have broken some of them?      A. It is possible.

Q. So then, when you say there were a lot of them broken, it could have been others that broke them too, or would it all be laid on Mr. Clark's doorstep?

A. The persons using the cartridges usually kept them segregated in the types they use.

Q. Well, could you tell me about how many Mr. Clark broke according to the number broken by others?

A. I'd say four broken by Mr. Clark.

Q. Just four?      A. Yes.

Q. How many were broken all together?

A. I don't know over a period how many were broken.

Q. Then, it would be rather hard for you to determine as to the number broken by Mr. Clark as against somebody else if you [107] were actually asked by question: How many does Mr. Clark break against how many somebody else broke?

A. Well, I've worked with the recorders myself, and I'd say a cartridge would last about six months with careful usage. Mr. Clark broke in his period four all together that I know of.

(Testimony of Charles B. Fields.)

Q. Well, to the best of your knowledge, will you put it this way—I'm not attempting to put words in your mouth—Mr. Clark broke a number of cartridges, how many of those that were broken you're not sure?      A. That's right.

Mr. Blair: That's all.

### Redirect Examination

By Mr. Merrick:

Q. Do you recall how long Mr. Clark worked there?

A. I'd say an average of about three and a half months if I'm not mistaken.

Q. Well, prior to his coming there, what would be the rate of breakage in cartridges?

A. I can remember one before he came there. That was about all.

Q. Did it increase after he came?      A. Yes.

Q. After he left, did it decrease?

A. Yes. [108]

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### DOYLE SEELY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Merrick:

Q. For the record, what is your full name, Mr. Seely?      A. Doyle Seely.

(Testimony of Doyle Seely.)

Q. And your address?

A. 236 East Main Street in Ashland.

Q. What is your occupation?

A. I'm program director of KWIN.

Q. And how long have you been program director, employed there?

A. About three and a half years. I started to work there in early '47.

Q. Were you ever contacted by anyone over there to join the union?      A. Yes, I was.

Q. Who requested you to join the union?

A. Ralph Click.

Q. Now, have you heard the testimony here regarding Mr. Wally [109] Clark?

A. Yes, I have.

Q. Did you have an opportunity to observe the quality of his broadcasts?

A. Not especially. I was around the building at different times when the show was on. I have heard it, yes.

Q. What was the quality of that broadcast?

A. I would say it was very poor.

Q. Now, there's been some testimony about the cartridges used in wire recorders.

Did you hear anything about Clark breaking a great many of those?

A. Yes, I heard it mentioned.

Q. Do you know for a fact that he was the one responsible for breakage of those?

A. I know that he broke several in the recorder that he used.



(Testimony of Doyle Seely.)

Q. Do you know where they were being broken?

A. No, other than that they were cartridges he used and were quite frequently broken and we had to send for replacements on them.

Q. Do you recall a demonstration at which Mr. Click had Clark run through the procedure for using the wire recorder?

A. Yes, I do.

Q. Can you describe that demonstration for us?

A. Yes, he asked me to show him how to operate one. Mr. [110] Click asked Mr. Clark that.

Q. Was that the purpose of this demonstration, to find out what was causing the trouble?

A. That was it, yes, and Clark showed him how quite frequently to save time on his broadcast, he'd start the motor first and insert the cartridge, rather than placing the cartridge in full recording position, then going ahead and turning the motor on. Had an idea that would save him a certain amount of time between different stages of the broadcast.

Ralph pointed out to him that wasn't the accepted way and described the right way to him.

Q. Well, is that procedure that Clark was using, is that contrary to the instructions in the manual to operate that machine?

A. I understand that it is, yes.

Mr. Merrick: Your witness.

#### Cross-Examination

By Mr. Blair:

Q. During the time you were around the station,

(Testimony of Doyle Seely.)

you say you had a limited amount of experience with the situation surrounding Clark?

A. I had very little contact with him.

Q. You are, I believe, a technician?

A. No, I'm not.

Q. You're not.

At the time that this occurred, would you have known the [111] proper method of operating one of the things—whatever they call them—recorders?

A. Yes, I did.

Q. Had you learned that?

A. Yes, I had operated a wire recorder considerably.

Q. You had at that stage? A. Yes.

Q. Had you done it elsewhere?

A. No, that's the only place I ever used it.

Q. Is it possible that anyone not having had proper instruction might have misused the machine?

A. Very possible.

Q. Could that have been possible in Clark's case?

A. Yes, I'd say it would be possible.

\* \* \*

### ROY F. RENOUD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [112]

### Direct Examination

By Mr. Merrick:

Q. What is your full name, Mr. Renoud?

A. Roy F. Renoud.

(Testimony of Roy F. Renoud.)

Q. How do you spell your last name?

A. R-e-n-o-u-d (spelling).

Q. And your address?

A. 1828 E. 41st Street, Portland, Oregon.

Q. And what is your occupation?

A. Business Representative for the International Brotherhood of Electrical Workers.

Q. And how long have you held that job?

A. Since March, 1948.

Q. And what are your duties? That is, as business representative of the Electrical Workers?

A. To organize the electrical industry as pertaining to radio broadcasts, radio service field, in the State of Oregon.

Q. Did you have occasion to organize Station KWIN?

A. Yes, I did.

Q. Can you give us the circumstances surrounding your organizing that station?

A. The station tied in early in July '49 and I received a request from Station KYJC to come down to Medford and organize the area.

Burnside, who was the chief engineer at Radio Station KYJC, sent me a letter and asked me to come down, which I did. [113]

I held a meeting in the afternoon with the technicians employed at Station KYJC. At that time, Burnside made a contact with Station KWIN and made arrangements for me to meet two of the technicians over in Ashland that evening in a restaurant.

We went over there and was introduced to Mr. Ralph Click and Mr. Charles Fields, who were

(Testimony of Roy F. Renoud.)

technicians employed at KWIN. During the discussion, I told them what our standard contract was for outside the metropolitan area.

We got into quite a lengthy discussion about the merits of union contact, how the station was operated, the amount of pay they should receive for the work, and also mileage and the benefits of paid holidays, and so forth.

At the time, Mr. Click and Mr. Fields signed authorization cards and applications. Also, they took two other applications and authorization cards to sign the other two technicians.

I told them that when I received the third application or authorization card, I would file with the N. L. R. B. for an election. They asked me at that time not to disclose any names, if I could refer to it as a majority rather than the men involved.

They felt it would be a very bad shock for the manager of the station.

I received the other authorization about a week later after going back to Portland. At that time, I directed a letter [114] to Mr. Barnett, the manager, telling him I represented the majority of the people employed in the station, and that I desired to enter into a collective bargaining agreement with him to represent the technicians.

Also, the same day I filed with the N. L. R. B. a petition asking for a representation election.

Q. Now, when you say you wrote him a letter, you're referring to General Counsel's Exhibit 2?

A. Yes.

(Testimony of Roy F. Renoud.)

Q. Did you receive any answer to that particular letter?

A. I received no answer at all as I can recall.

Q. Now, you state that on or about the date of that letter you also filed a petition with the Board?

A. That is correct.

Q. Then what happened?

A. Well, after filing with the Board, I was called by the officer in charge of the Portland office and asking if I knew any information on commerce.

I told him, no, that I didn't.

Q. Who is that officer in charge?

A. Robert Wiener. He was going to make a trip into Southern Oregon. So, he said he would get the necessary data and also set up the election date.

At that time, I had another petition in for KMED also.

He came down and set up the election dates for the [115] election to be held. He assigned the election to Mr. Ed Young, one of the Field Examiners.

Q. In other words, you worked out a consent election agreement with——

A. The Board did, yes.

Q. All right. And Mr. Young came down to hold the election, is that your testimony?

A. Yes, Mr. Young came down. I flew down and met him here. He was already here.

Q. Did you have a pre-election discussion with the management?

A. Yes, there was a pre-election discussion set up about an hour previous to the election.

(Testimony of Roy F. Renoud.)

Q. Who attended that election, or that discussion? A. Mr. Barnett, Young and myself.

Q. And what was the conversation in that discussion?

A. The conversation was led off by Mr. Young, who explained how the election would be conducted, that each side was entitled to an observer. I chose Mr. Fields. Mr. Barnett chose one of the other staff, and we also discussed as to whether Mr. Click was a supervisor or employee as defined under the Act.

Q. Who asked whether or not Mr. Click was a supervisor? A. Mr. Young.

Q. How was the question asked?

A. The question, I believe, was directed to Mr. Barnett, [116] whether Mr. Click had the power to hire, fire, effectively recommend the same, or any supervisory positions, in relation to wage increases or direction of the other employees, of the other technicians working at the station.

Q. Did he read from a document?

A. Yes, he did. He read from the standard form that all the Examiners carry with them.

Q. Well, he was reading from a copy of that?

A. Yes.

Q. What was Mr. Barnett's answer to that query?

A. Mr. Barnett's answer was that the complete control of the station and all personnel was directly under his supervision and no one else's.

Mr. Click's position, as chief engineer, in compliance with Federal Communications regulations

(Testimony of Roy F. Renoud.)

was to see that the equipment was maintained. He had no power to do anything else as laid out by the Act as a supervisor employee.

Q. In other words, it was his position that Mr. Click should vote in the election?

A. That is correct.

Q. Subsequently, was there any challenge to Mr. Click's vote?

A. There was no challenge whatsoever.

Q. Now, do you recall Mr. Click being discharged?      A. Yes, I do.

Q. How were you informed of that fact? [117]

A. I was informed by telephone by Mr. Click, and a letter followed in a day or so afterwards.

Q. And what action did you take regarding that?

A. I contacted Mr. Barnett on the phone, told him that we felt it was an unfair labor practice that he was discharged for union activity, and asked for him to be reinstated at the time.

Q. Did you ask for any reasons as to why he was fired?

A. Yes. As I recall, the reason was that he created dissension among the men and that he had not maintained the equipment properly.

Q. Were there any instances given where he failed to maintain the equipment properly?

A. No, there wasn't. I followed that up by checking with Mr. Chapman, the F. C. C. inspector, as to whether there had been any citations that the equipment hadn't been up when he made his periodic

(Testimony of Roy F. Renoud.)

inspections, and he told me, no, that the equipment had always been satisfactory.

Q. Was anything said about the "man on the street" program, Wally Clark?

A. Nothing was said about that.

Q. Was anything said about the rodeo broadcast?

A. No.

Q. Was there anything said about Mr. Click being incompetent?

A. Only that, as I recall it, Mr. Barnett said that he hadn't kept the equipment up to their satisfaction. He didn't lay out [118] just why or his reason.

Q. Did he say anything about him wilfully neglecting his duties?      A. No, he did not.

Mr. Merrick: You may examine.

### Cross-Examination

By Mr. Blair:

Q. Mr. Renoud, I would like to ask you if it's standard practice on the part of I. B. E. W. to place the second paragraph, as it's written in that letter, on your communications whenever you're having an election?

A. Only when we've been told by the employees of that particular bargaining agency that they're liable to be fired for joining the union.

Q. Tell me, what led you up to that point in this particular case?

A. The conversation that I had with Mr. Fields and Mr. Click in the restaurant at Ashland. They



(Testimony of Roy F. Renoud.)

were afraid that they would lose their jobs if they did join the organization.

Q. Did they give you any indication as to what they were afraid of?      A. Yes, discharge.

Q. You heard the testimony of all the witnesses Mr. Merrick has called up to this point in regard to any threats, intimidation or coercion.

Are you still satisfied that there was such a threat made? [119]

A. I'm satisfied that he got information from some other source as to just what he could do or whether he thought he could.

Up to that time, my impression was that it was not set.

Q. Well, will you tell me about the time that you wrote this letter of July 25th?

Can you tell me what time you picked up the information from Mr. Fields and Mr. Click?

A. It was about the middle of July. I don't remember the exact date.

Q. And you immediately wrote the station after receiving the information from them?

A. No, as I explained in my previous testimony, I took two authorization cards back with me. When I received the third, which gave me a majority in the station, then I wrote the letter.

Q. That accounts for a delay of about how long, a week?      A. I believe around a week. [120]

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Q. (By Mr. Blair): Mr. Renoud, were you there and able to hear all of the conversation so that what you related in your [121] previous testi-

(Testimony of Roy F. Renoud.)

mony as said by Mr. Young was actually said by Mr. Young?      A. That is correct. [122]

\* \* \*

### RALPH CLICK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Merrick:

Q. Your name is Ralph S. Click?

A. That's right.

Q. Spelled (spelling) C-l-i-c-k?

A. That's right.

Q. What is your address, Mr. Click?

A. 121 Manzanita Street, Ashland, Oregon.

Q. And at the present time, what is your occupation?      A. Truck driver.

Q. By whom are you employed?

A. J. W. Taylor.

Q. How long have you been with him?

A. Approximately two months.

Q. And what was your last prior [126] employment?

A. Chief engineer, Radio Station KWIN in Ashland.

Q. And when did you leave their employ?

A. The second of September of last year.

Q. That's 1949?      A. Yes, sir.

Q. And how did you happen to leave?

A. I was discharged.

(Testimony of Ralph Click.)

Q. You were fired? A. Yes, sir.

Q. When did you first go to work there?

A. February the 4th, 1947.

Q. And prior to going to work there, where were you employed?

A. I was employed at KWIL in Albany, Oregon.

Q. What was your job there?

A. Technician-announcer.

Q. Technician-announcer? A. Yes, sir.

Q. And how long were you up at Albany?

A. Well, I was there twice for about four months each time. I was there from December, I think it was, or November of 1945 to February of '46, and then from October of '46 until February of '47.

Q. Prior to working there, what experience had you had in radio?

A. Radio experience that I've had is rather varied and all [127] inclusive.

At one time, I was in the engineering and designing department at Bendix Aviation at Burbank, California; also with the Glendale, California, Police Department as a radio engineer; the Arcata Police Department as a radio engineer; KRKA, Los Angeles, as a technician, and three years and half overseas flight with Consolidated Aircraft as a radio operator.

Q. That's during the last war?

A. During the last war, yes.

Q. Any other experience?

(Testimony of Ralph Click.)

A. Since 1935, I've been more or less active as amateur operator, constructing and designing my own equipment, also wireless operator in the United States Navy in 1918 and 1919 in Navy aviation.

Q. Well, in all, how much experience have you had in radio?

A. Approximately fifteen years.

Q. Now, you say that you first went to work at KWIN on February 1, 1947?

A. February 4th, 1947.

Q. What were the circumstances that brought about your going to work there?

A. I was requested by Mr. Reinholdt, the Manager at the time, to come to Ashland and assist in rebuilding the station after their disastrous fire the preceding December, to make sure that the station was built up according to the underwriters' code, [128] that good engineering standards were in practice as set up by the Federal Communications Commission, and to make sure that there wouldn't be any disastrous fire or cause for any fire in the future.

Q. Did you come down and rebuild the station?

A. I did, yes.

Q. And at that time, was the station in operation?      A. No, sir.

Q. When did it subsequently go into operation?

A. On the ninth of March, 1947.

Q. And what was your position at that time?

A. Announcer-operator.

(Testimony of Ralph Click.)

Q. And how long did you remain an announcer-operator?

A. I believe it was in August of that year that I was made chief engineer.

Q. August of '47? A. Yes, sir.

Q. Now, who else was in the Engineering Department at that time besides yourself?

A. Well, there was Floyd Rush, chief engineer; Charles Fields, Tom Braconivitch, as I recall it.

Q. Mr. George started there after you had been in the Engineering Department? A. Yes.

Q. How about Mr. Smith? [129]

A. Mr. Smith was one of the more recent employees.

Q. Now, I would like to call your attention to the pleading which is entitled an answer to the complaint filed by Respondent. That's known as General Counsel's Exhibit 1-F. The paragraph starting, "That on December 31, 1947 . . ."

Do you recall the circumstances surrounding the discharge of Mr. Marion Maston?

A. Yes, I do.

Q. Well, would you explain those for the Trial Examiner and Counsel?

A. The circumstances involved approximately two weeks prior to that date—however, the date was January 1st, rather than December 31st.

Mr. Reinholdt had left the station to attend a convention in California. Mr. Charles Fields was on his vacation, which he had arranged for over the Christmas holidays. Mr. Braconivitch was leav-

(Testimony of Ralph Click.)

ing, had given his two weeks notice, and had stayed over a week, waiting for a replacement which Mr. Reinholdt had made with an operator in Portland, who on the day he was supposed to arrive, called me by phone from Portland to the effect that he was unable to accept the position, having accepted work elsewhere, which left only myself and an operator that we borrowed from KMED part time in the afternoon.

Mr. Braconivitch had waited as long as he could and he left. [130]

So, in the emergency, I called Portland, contacted several fellows up there, and the only operator available was this Marion Maston. He came to the station, went to work, and for about two weeks was very good.

Then, on the night of January the 1st, he showed up at the station for his shift at five o'clock dead drunk. He was so drunk he couldn't even find the door. He had to wallow through it.

I suggested he go home and sleep it off and come back tomorrow and pick up his regular shift and I would stand by for him. He wasn't satisfied with that. He wanted to stay around and argue, tried to keep in everybody's way.

So, I told him to go on home and stay there until Mr. Reinholdt came back and he could get his check, he was all through.

Q. That was in the absence of Mr. Reinholdt?

A. That's right.

(Testimony of Ralph Click.)

Q. Were you given any authority by Mr. Reinholdt to hire and fire in his absence?

A. Not directly, no.

Q. You had that authority though?

A. He gave me the authority to take care of the station in his absence.

Q. Now, when did Mr. Reinholdt leave the station, KWIN?      A. On this trip? [131]

Q. No. When did he quit?

A. I believe it was September of 1948.

Q. And who was he replaced by?

A. Mr. Barnett.

Q. Under Mr. Barnett, did you have that same authority?      A. No.

Q. Were you told that you did not have it?

A. Yes.

Q. Will you explain the circumstances surrounding that?

A. There was an operator-announcer by the name of Beckett that seemed to have a great deal of difficulty adapting himself to the method of operation used at the station.

Anything new coming up, a change of procedure, he was unable to understand it, and was very reluctant to even try. In all, he was rather unsatisfactory, and shortly after Mr. Barnett was made Manager, I went into his office and told Mr. Barnett that I had taken about all that I could, that I was going to discharge the man.

Mr. Barnett told me then that he would do all the hiring and firing at the station.

(Testimony of Ralph Click.)

Q. Well, then, in Mr. Barnett's absence, who had the authority to hire and fire?

A. Mr. Bardeen.

Q. And who is that gentleman?

A. He's the Commercial Manager of the station. [132]

Q. Were you told that by Mr. Barnett?

A. Yes.

Q. When did that happen?

A. Mr. Barnett went on a convention trip—I don't know just how soon it was after he became Manager—several months later, and he informed me then that Mr. Bardeen was in charge of the station.

Q. Now, during all the time that you worked for KWIN, from February 4, 1947, to the date of your discharge on September 2, 1949, did you ever receive any F. C. C. citations? A. No, sir.

Q. Under Mr. Reinholdt, was your work ever criticized by Reinholdt?

A. Not that I recall.

Q. Were you ever commended for your work by Reinholdt? A. Yes, a number of times.

Q. Do you recall some of those instances?

A. One was on the Shakespearian broadcast the first of the year in 1948. He thought it was a very good job and said so.

Q. Was that rather a large job for the station?

A. Yes, it is.

Q. How long does the Shakespearian festival last in Ashland?



(Testimony of Ralph Click.)

A. Well, we only run one series of plays, four different nights, four plays. We did them sometimes three or four times during the session. [133]

Q. He commended you for your work on that?

A. He did, yes, sir.

Q. Do you recall any other instances where you were commended for your work?

A. Oh, a number of times on football games, pickups that we made on football games, basketball games. I don't recall any specific instance.

Q. Now, under Mr. Barnett, were you ever criticized by Mr. Barnett regarding the way you handled your work?

A. No, not that I recall.

Q. Were there any charges made by Mr. Barnett against you as causing trouble and dissatisfaction?

A. No.

Q. Did he ever compliment you for your work?

A. Once.

Q. What was that instance?

A. That was on the instance of a remote broadcast of the Southern Oregon music festival at the college.

Q. What were the circumstances surrounding that?

A. That was a remote pickup of a hundred piece orchestra, two hundred piece band, and a hundred piece vocal group.

Q. What did Mr. Barnett have to say in that case?

A. Good job.

(Testimony of Ralph Click.)

Q. Do you recall working with Mr. Wally Clark?      A. I do. [134]

Q. Did Mr. Barnett ever say anything to you about failing to keep up Mr. Clark's equipment?

A. No, sir.

Q. Did he ever say anything to you about the broken cartridges?

A. He mentioned the fact that the repair cost was getting to be exhorbitant on the equipment.

Q. Did he blame you for the breakage?

A. No, not that I recall.

Q. Can you give us the circumstances surrounding this cartridge breakage with Mr. Clark?

A. When Mr. Clark first came to work, I was given to understand that he was a free lance artist and the station was to furnish him the equipment to be repaid out of his earnings, and I was instructed to teach him to use the wire recorder and the proper mike technique for the use of it.

I had several instruction sessions with Mr. Clark till he got to the point where he felt he knew more than I did, so I felt to instruct him any further was useless. He was rather arrogant and egotistical individual.

So, I felt I could do no more for him, and shortly after that he got the habit of inserting his cartridges, as has been discussed here so much today, into the motor equipment—into the equipment after the motor was started.

The cartridge is so constructed that it is placed on the [135] shaft, and when this motor shaft is

(Testimony of Ralph Click.)

turned over, thirty-six hundred R.P.M., it strikes this rubber driving drum on the fine wire and causes it to break, not every time, but it does cause it to break a number of times.

And these cartridges cost, oh, from thirteen dollars, I believe, up around to fifteen dollars each. Mr. Barnett complained about the excessive cost.

So, I suggested that as long as the equipment was Mr. Clark's, that the cost of repairs and my time of repairing them should be billed to Mr. Clark.

Q. Now, do you recall the rodeo broadcast?

A. I do.

Q. And did Mr. Barnett say anything to you about the engineering work on that broadcast?

A. Mr. Barnett said that Mr. Liebman and I had, or should have a discussion on the proper mike placement for this particular set-up. Mr. Liebman was in favor of having the microphone set up in the judges' stand and one in the announcing booth or the press box.

I objected on the grounds that necessary microphone cable necessary to run out to this judges' stand, together with the crowds and the bawling cows, and the language sometimes used by the cowboys would not be the very best for broadcast qualities.

As a counter suggestion, I suggested that we use both announcers in the press box and use a runner from the press [136] box to the judges' stand to get the results, which would necessitate possibly

(Testimony of Ralph Click.)

a short delay, but would make for a better broadcast.

I was overruled and agreed to set the microphone up in the judges' stand as he wished.

Q. Well, was there any criticism of the finished product?      A. None that I heard.

Q. Well, would you have heard it if there had been?      A. I should have.

Q. Now, there's been some testimony here by Mr. Barnett regarding the use of a credit card, a Texaco credit card.

Do you recall the use of such a credit card?

A. I do.

Q. Will you give us the circumstances surrounding that credit card?

A. Shortly after Mr. Barnett was made the Manager of the station, I asked him if I could have a credit card because there is quite a bit of running around a chief engineer has to do at the station in his own car to check the remote lines, set-ups, positions, go over to Medford to obtain parts.

So, Mr. Barnett agreed to give me a card. I used it for—oh, I'd say two or three months very conservatively. Then, as Mr. Barnett testified, I used some for my personal use. I readily admitted it and wasn't hesitant about it at all.

I felt it was my just desserts, but I never took the time [137] and trouble to take it up with Mr. Barnett.

Prior to the time of Mr. Barnett's managership, I did the same work at my own expense for a year

(Testimony of Ralph Click.)

and a half, and I felt I had something coming.

Q. Well, after this discussion with Mr. Barnett regarding the credit card, was anything else ever said about it?

A. No, he told me that that wasn't the proper thing to do and I said, "All right, it won't be done any more."

Q. And then it was dropped?

A. It was dropped.

Q. When was that?

A. I imagine around May or June of 1948. I don't know for sure.

Trial Examiner Parkes, II: What year?

The Witness: '48.

Q. (By Mr. Merrick): Do you recall when it was in relation to the rodeo broadcast?

A. It was prior to that.

Q. It was the year before?

A. No, just prior to it.

Q. Then, it would be '49? A. '49.

Q. Now, when did you first get interested in the union at KWIN?

A. When I was contacted by Mr.—the chief engineer at [138] KYJC—what is his name?

Q. Would that be Mr. Burnside?

A. Burnside, yes.

He called me one evening, said a union representative was in from Portland and asked me if I was interested. So, I thought it would do no harm to find out what the union had to offer and I in-

(Testimony of Ralph Click.)

vited the representative to Ashland to have a meeting.

Q. And did you have that meeting?

A. We had that meeting at the Spotlight Cafe in Ashland.

Q. Did you hear Mr. Renoud's version of it?

A. I did.

Q. Is that your version of it also?

A. Yes, sir.

Q. And after Mr. Renoud's visit, what further steps did you take regarding the union?

A. Well, after I signed the authorization card and application, I asked Mr. Renoud to allow me to have two extra application blanks that I might pass on to the other members of the staff.

Q. The other men in the unit? A. Yes.

Q. And which men were they?

A. Mr. Seely and Mr. George and Mr. Smith.

Q. Was Mr. Seely in the unit?

A. No, he wasn't, but I tried to get [139] him in.

Q. And did you sign those people up too?

A. Signed up Mr. Smith. The other two were not signed.

Q. And now, you've heard the testimony regarding this election on August 29, 1949.

Did you vote in that election? A. I did.

Q. Now, prior to that election, did you have any conversations with anyone from management regarding your views on the union?

A. Yes, I did.

(Testimony of Ralph Click.)

Q. Who did you have the conversation with?

A. Mr. Barnett.

Q. And when?

A. That was the day he received this letter from Mr. Renoud.

Q. How did the conversation take place?

A. He called me into his office.

Q. Could you give us the conversation?

A. I don't know whether I can give it all to you or not because he was obviously very mad.

Mr. Blair: I object to that.

Q. (By Mr. Merrick): All right. You say he was mad, what is the basis for that statement?

A. His ears were white.

Q. And what was his manner of speaking?

A. Overbearing and domineering. [140]

Q. What did he have to say?

\* \* \*

A. He asked me first what I thought about this union deal, and I told him I thought it would be a good thing for the employees, and he said that anyone "who is not satisfied here, can quit. We don't want any damned union around here. They leave a very bad taste in my mouth, and it would if you joined the union behind my back."

This continued for quite some time, very repetitious. Obviously, the man didn't like the idea of our joining the union. I told him that the union had made no demands on him and didn't intend to make any demands on the station.

(Testimony of Ralph Click.)

I also suggested they wait until demands were made before he started jumping too far to conclusions.

Q. What else was said, do you recall?

A. He said it left a very bad taste in his mouth. He repeated that a number of times and finally he said he wouldn't rest until it died.

Q. That was prior to the election?

A. That was the day he received the letter from Mr. Renoud, approximately two or three weeks prior to the election.

Q. Did you have any other conversations with Mr. Barnett [141] before the election?

A. No.

Q. Did you vote in the election?           A. I did.

Q. Do you have any objection to saying how you voted?           A. No, I voted for the union.

Q. Did anyone challenge your voting?

A. No.

Q. And what happened next after the election?

A. Everything seemed to settle back down to a normal routine until about 4:20 in the afternoon of September 2nd.

Q. That would be the Friday after the Monday on which the election was held?

A. That's right.

Q. Monday was August 29th, and what happened on September 2nd?

A. Mr. Barnett called me in the office and asked me to close the door and said, "Ralph, we're going to have to let you go."



(Testimony of Ralph Click.)

And he listed approximately seven or eight various reasons, that I was inefficient, uncooperative, trouble maker; I hadn't the slightest conception of the duties of a chief engineer; unqualified, kept the other employees in a state of turmoil to where they were unable to do their work for two weeks at a time; I talked to members of the Board of Directors behind his back; seeking other employment; and I don't remember any [142] more.

Q. What was the matter on that occasion?

A. He was very upset.

Q. Why do you say he was upset?

A. Well, any employer who is discharging an employee, if they're not in another state or upset, would not give him twenty minutes to get off the premises.

Q. Did he shout it to you?                      A. He did.

Q. Was that his usual manner of speaking to you?

A. No. Then, he ran into the control room, grabbed my license off the wall before I was able to get to it, took it into the office and was in such a haste he couldn't wait to take the padding off the back to get at my license that he took a knife and cut it out.

Q. Was it in a frame?                      A. Yes, sir.

Q. And he cut it out of the frame?

A. Yes, sir.

Q. Now, prior to this, did you have anything to say to the charges?

A. Well, he endorsed my license as unsatisfactory on the portion on the back of the license where

(Testimony of Ralph Click.)

the station endorsement is placed. He endorsed it as unsatisfactory. [143]

Q. Well, did you have anything to say to these charges being made against you?

A. No, I didn't say anything.

Q. Then you left the station? A. I did.

Q. Were you thrown off the station?

A. No, I wasn't thrown off. I said to Mr. Barnett, "Aren't you kinda rushing things?"

And he said, "That's the way it is," or words to that effect. He told me to use my own judgment on picking up my tools because he didn't know whose tools were which, whether they belonged to the station or which was mine.

Q. Was that a regular payday?

A. No, sir.

Q. What was your payday there?

A. The first and fifteenth.

Q. In other words, you had just received a month's pay, is that right? A. That's right.

Q. And when you were discharged, you had some additional pay? A. Two days.

Q. Do you know who succeeded you as chief engineer? A. Phil George.

Q. Now, prior to the date of discharge, the day of discharge, had you ever been told by Mr. Barnett that you were inefficient? [144] A. No, sir.

Q. Had he ever told you that you were unco-operative? A. No, sir.

Q. Had he ever told you that you were a trouble maker? A. No, sir.

(Testimony of Ralph Click.)

Q. Had he ever told you that you were inefficient? A. No, sir.

Q. Had he ever told you that you were unqualified? A. No, sir.

Q. Had he ever told you that you were keeping the employees in a state of turmoil?

A. No, sir.

Q. Had he ever told you that it was against the policy of the company for employees to seek other employment?

A. No, sir. He did say he wouldn't hold that against me.

Q. That was one of the charges he levied against you the day you left? A. Yes, sir.

Q. Had he ever told you before this it was against the rules to talk to the Board of Directors?

A. No, sir.

Q. Had that been done with his knowledge?

A. Well, I don't understand why it should be his knowledge because the Board of Directors are friends of mine.

Q. Well, did other employees talk to the Board of Directors? [145] A. Yes.

Q. Now, on the date that you were discharged, was anything said about the quality of the rodeo broadcast? A. No, sir.

Q. Was anything said of broadcasts?

A. No, sir.

Q. Was anything said about Mr. Wallace Clark?

A. No, sir.

(Testimony of Ralph Click.)

Q. Was anything said about wilful neglect of duty?      A. Not that I recall.

Q. Now, on the date that you were discharged, September 2nd, were you all caught up on your work at that time?      A. I was.

Q. When was that in relation to your regular overhaul period?

A. It was the day following.

Q. What is that, a monthly overhaul?

A. That's a complete overhaul on the first Thursday of the month, with a frequency check with the R. C. A. at Point Reyes, California. That's a working agreement with the Federal Communications Commission and is accepted.

Q. Is that monthly overhaul then, and frequency check a large job?      A. Yes, it is.

Q. And this discharge was on the day after that job?      A. It was. [146]

Q. What time did you get through work on that Friday morning?      A. About two, two-thirty.

Q. Do you recall the prior testimony regarding Mr. Clark being in the station after eleven o'clock at night?      A. I do.

Q. Have you ever been given any instruction by anyone regarding visitors in the station after working hours?

A. When the station was first put on the air after it was rebuilt after the fire, Mr. Hamaker and Mr. Reinholdt, Andrew Weisman, who was employed at that time, Mr. Edwards and myself were present.

(Testimony of Ralph Click.)

Mr. Hamaker established a policy of no one being permitted in the station after hours with the exception of the Manager, the chief engineer or someone he may bring with him, and the watchman.

Q. And do you know if that rule was ever rescinded?

A. To my knowledge, it was never rescinded.

Q. And was that the basis of your seeking to get Mr. Clark out of the station?

A. That was. That and the fact that he was turning the equipment on at night.

Q. Now, what happened the next day after this?

A. Well, the next afternoon—I imagine around four o'clock—I was operating the console. Mr. Barnett came into the [147] control room and wanted to know why I had removed Mr. Clark the night preceding.

I told him as far as I was concerned that letter from Mr. Hamaker still stood and no one had ever changed it to my knowledge; furthermore, that I had reports from Phil George that Wally Clark had been in there attempting to turn on some of the equipment at night after hours after we had left, also Mr. Sellens told me that.

Q. To turn on equipment after closing hours, is that a violation of F. C. C. regulations?

A. It is.

Q. As chief engineer, is that your responsibility?  
A. It is. [148]

(Testimony of Ralph Click.)

Q. Now, you stated that Mr. Barnett informed you that you had no authority to hire and fire when you had this trouble with Beckett, did he ever change that statement?      A. No.

Q. When was that, when do you recall that happening?

A. It was in the latter part of September or October of '48, I believe it was, shortly after he became Manager.

Q. Now, were your conditions of employment, hours, and so [149] forth, the same as the other people in the Engineering Department?

A. Not necessarily.

Q. Would you explain that?

A. There were times when my work would be caught up and I had nothing to do, except possibly catch up on the latest trade periodicals.

Other times, when there's difficulty or something to be done, I might work all night long.

It was a case, when I first took over as chief engineer, I worked for possibly a week and a half or two weeks day and night to get the station into shape.

Q. Well, was there any overtime pay?

A. No.

Q. Well, did any people in the Engineering Department get overtime?

A. Some of the announcers would get overtime.

Q. But not the technicians? There's no overtime?

A. Well, it's possible—be out on a remote job,

(Testimony of Ralph Click.)

something of that sort, they would put in for overtime and receive it.

Q. Did you ever put in for overtime?

A. No, sir.

Q. Were you ever told that you did not have the right to overtime?      A. No, sir. [150]

Q. Did you ever ask for a pay raise?

A. Yes, I have.

Q. What was said on that?

A. We were promised when the station first organized there would be a semi-yearly pay increase.

Q. That's to all people in the Engineering Department?      A. Yes.

Q. Do you know if that was granted?

A. Once, I believe, when Mr. Reinholdt was Manager.

Q. Did you get that with all the other technicians?      A. Yes.

Q. In other words, you were considered in the same group with them as far as that pay raise was concerned?      A. That's right.

Q. Now, those restrictions on the use of gasoline?

A. You mean from this credit card incident?

Q. Yes.      A. Yes.

Q. Now, did you instruct the technicians under you as to how to operate the equipment?

A. I did.

Q. Was that pursuant to the directions of Mr. Barnett?      A. Yes.

(Testimony of Ralph Click.)

Q. Did you make out their sechdules for them when they first went to work? [151]

A. Yes, I did.

Q. Did those schedules first have to be approved by anyone? A. By Mr. Barnett.

Q. By Barnett. Could you order overtime for any of these engineers if you so desired?

A. I couldn't order it. I could ask them.

Q. Well, on your own, could you order it without checking with Mr. Barnett? A. No, sir.

Q. Could you recommend changes in the job assignments? A. No, sir.

Q. Now, could you recommend the hiring of anyone? A. No, I couldn't.

Q. Well, now, did Mr. Barnett ever check with you regarding the hiring of new employees?

A. Yes, he would.

Q. Would he follow your recommendations?

A. On one instance, he didn't.

Q. What instance was that?

A. A boy by the name of Wyatt. Mr. Barnett brought him over there and asked me to make an audition of the recording, and he asked me what I thought of him, and I said, "I think he will be all right. He isn't too smooth at the present, but we are desperately in need of an operator." And Mr. Barnett turned [152] him down.

Q. Now, when Mr. Liebman went to work there, did he check with you?

A. He called me in the office one day and mentioned the fact that he was going to make Mr.



(Testimony of Ralph Click.)

Liebman head of the staff. He asked me what I thought of it, and I told him I thought that one sports announcer was all the station could afford.

Due to the fact that he had been thinking for a long time of laying off one of the technicians, I thought it was uneconomical to employ another sportscaster and dispense with another technician which we badly needed.

Q. And was Mr. Liebman hired?

A. He was.

Q. And he didn't follow your recommendation?

A. He did not.

Q. Now, did you ever submit—there's been some testimony here—during Mr. Barnett's tenure there, did you ever recommend the firing of any technicians? A. Only Mr. Beckett.

Q. And your recommendation, was it followed?

A. No.

Q. Could you give these people under you a pay raise? A. No, sir.

Q. As a matter of fact, did you know what they were making? A. No, sir. [153]

Q. Now, regarding the making out of schedules, were you specifically instructed to do that by anyone? A. Not specifically, no.

Q. Well, when you first took over as chief engineer, did that become part of your duties?

A. It did, yes.

Q. Is that a routine duty for the chief engineer?

A. It is.

Q. How often was the schedule changed?

(Testimony of Ralph Click.)

A. Once the schedule was posted, it usually stayed on the wall and was effective until possibly a change in personnel, then there would be a new schedule arranged.

Q. Would that last for months generally?

A. Yes.

Q. Did that have to have the approval of anyone when it was made?

A. Mr. Barnett.

Q. Now, during the time that you were there, you people in the technical department, when new ones came in, who interviewed these applicants?

A. Mr. Barnett.

Q. What does the term "chief" mean in relation to chief engineer?

A. Well, he could be several different meanings, depending on the size of the station. Now, at a large station like KNX [154] in Los Angeles, for example, the chief engineer is the next man to the manager.

In a small station, like KWIN, the chief engineer is merely a glorified mechanic. I mean by that, he's really the chief technician. The term engineer is a misnomer.

Q. In other words, you're the number one engineer?

A. That's right.

Q. Do you know what your experience was in comparison to the other people in the Engineering Department?

A. You mean my radio experience?

Q. Yes.

A. Yes, I did.

(Testimony of Ralph Click.)

Q. Well, how much experience did Mr. George have?

A. Mr. George came straight from Multnomah College in Portland.

Q. And he's the man that took your job when you were discharged? A. That's right.

Q. How much experience did Mr. Smith have?

A. Mr. Smith was employed straight from the Oregon Vocational School in Klamath Falls.

Q. And how about Chuck Fields?

A. Chuck Fields? I don't know how much experience he had. He had quite some experience before he came to KWIN. He also was a graduate of Multnomah College of Portland. [155]

Q. Did you work a regular scheduled shift with the others?

A. I worked a relief shift and regular schedule.

\* \* \*

Q. (By Mr. Renoud): Mr. Click, after your discharge on September 2nd, 1949, were you sent to any other station for work by the union?

A. Yes, I was.

Q. Were you sent to Coquille, at the station there? KWRO? A. Yes, I was.

Q. Did you make application there to go to work? A. I did.

Q. Were you sent to Grants Pass for a job?

A. I was.

Q. To Bend? A. Yes.

Q. On any of those stations, did they take your application? A. They all took it.

(Testimony of Ralph Click.)

Q. Did they give you any reason for not hiring you when they [156] had an opening?

A. None.

\* \* \*

Q. (By Mr. Renoud): Mr. Click, did you go out to other stations seeking employment?

A. I went to practically every station outside the metropolitan area of Portland. I contacted the stations in Washington, Idaho, Eastern Oregon, with the same result. [157]

\* \* \*

### Cross-Examination

By Mr. Blair: [158]

\* \* \*

Q. (By Mr. Blair): Did you work with Mr. Reinholdt at Albany? A. I did.

Q. Mr. Reinholdt was the one that hired you at Station KWIN? A. He was.

Q. What was your title when you came down here?

A. I don't know as I had any until the station went on the air. Then, I was the announcer-operator.

Q. Did you relate in your previous testimony that you came down here to supervise putting the station back on the air? A. That's right.

Q. And what about this man, Mr. Rush, who was here at the time, what was his title?

A. Chief engineer.

Q. Were there two chiefs on the job, is that it?

(Testimony of Ralph Click.)

A. No, sir.

Q. Well, who was it—getting the station back on the air?

A. Mr. Rush officially, actually he was drunk all the time.

Q. Well, I didn't ask you if he was drunk all the time. I want to know who was the chief engineer on the job?

A. Rush. [159]

\* \* \*

Q. (By Mr. Blair): While Mr. Reinholdt was Manager of the station, there occurred the firing of one Mr. Maston. It's our understanding—it's my understanding that your testimony here is that you fired Mr. Maston?

A. I did.

Q. Do you recall at any time subsequent to that that you were given instructions not to fire anyone?

A. No, sir.

Q. So then, it could be assumed that, inasmuch as you had the right to fire Mr. Maston if it occurred in your department, that you still had that?

A. Not necessarily.

Q. Was there ever any time when that order was rescinded or when you were told specifically that you were not to fire anyone?

A. I was told by Mr. Reinholdt, when he was away, that I was [160] in charge of the station.

The next time he went away on a trip, he said, "Take care of things, but don't start throwing your weight around."

Q. I asked you a specific question.

(Testimony of Ralph Click.)

Were you ever told that you were not to hire or fire anyone after that date?      A. No, sir.

Q. After the firing of Mr. Maston?

A. No, sir.

Mr. Merrick: Now, let's make this more specific. I want to make an objection here.

I want to find out first if this question covered Mr. Barnett's tenure as Manager also.

Mr. Blair: I asked this witness if subsequent to the firing of Mr. Maston he had ever received any instructions from anyone not to hire or fire.

Trial Examiner Parkes, II: If you have any questions on that, you can clear it up on redirect.

A. I received instructions from Mr. Barnett.

Q. (By Mr. Blair): What were your instructions from him?

A. That he would do the hiring and firing.

Q. When did he give you those instructions?

A. Shortly after he became Manager.

Q. Do you recall the specific time?

A. It's in the record. [161]

Trial Examiner Parkes, II: Well, tell us again please?

A. The case of Ralph Beckett, who was unsatisfactory, and I went into Mr. Barnett's office one morning and told him that he was unsatisfactory and I was going to replace him.

Q. (By Mr. Blair): Was Mr. Barnett Manager at that time or Mr. Reinholdt?

A. Mr. Barnett.

Q. You're sure of that?      A. Positive.

(Testimony of Ralph Click.)

Q. Also in your testimony, you touched upon the fact that there were occasions when you were given credit by both Mr. Reinholdt and Mr. Barnett for your good work, but that never at any time had you been criticized. Is that true?

A. To the best of my knowledge, yes.

Q. Do you recall any specific dates upon which you were given credit for your work?

A. No, I do not.

Q. And you don't have any specific dates in mind that you were criticized? A. No, sir.

Q. You just don't remember specifically?

A. I don't recall any specific instance, no, sir.

Q. Then, how do you pin down the fact that you had not been criticized, but that you had been given credit?

A. A pat on the back is much nicer to take than a slap on [162] the jaw.

Q. It's well remembered, I take it?

A. That's right.

Q. Can you give us some approximate time when this occurred, or what the occasion was?

A. No, I can't say specifically what the date, what the case was. I know on numerous occasions Mr. Reinholdt complimented me.

Q. So, actually it's hard for you to remember when you were given credit for anything and it's equally hard for you to remember that you were criticized? A. I didn't say that.

Q. Well, I'm asking you that.

A. I said I can remember a number of occasions

(Testimony of Ralph Click.)

of getting a "work done well" but I can't tell you the job or the date or the time of the day.

Q. But you remember no time when you were ever criticized for anything in connection with your work?

A. Oh, possibly I have had criticism, but I told you I hadn't remembered them. Not to my knowledge, I can't put my finger on them.

Q. Neither can you lay your finger on a specific time when you were given credit, is that right?

A. No, sir. [163]

\* \* \*

Q. (By Mr. Blair): Did you use the credit card for your own use? A. I did.

Q. And that is admitted? A. It is.

Q. You were censured for that by Mr. Barnett?

A. I was.

Q. In a gentlemanly way? A. Yes, sir.

Q. Now, in regard to this man Clark being a visitor at night to the station, you had received instructions some time in the past, or you say that you were to admit no one to the station?

A. That's right.

Q. And who issued that order? [164]

A. Mr. Hamaker.

Q. Did he ever rescind that order?

A. Not to my knowledge.

Mr. Merrick: Who is Mr. Hamaker for the record?

The Witness: Mr. Hamaker is President of the Corporation.



(Testimony of Ralph Click.)

Q. (By Mr. Blair): Did you have personal knowledge that Mr. Clark had been in the station and using equipment during your absence?

A. No personal knowledge other than the night he was there that I was operating in the station late.

Q. Was he using the equipment at that time?

A. He was using the telephone at that time.

Q. Well, now would you explain for the benefit of the Examiner what we mean by the term "equipment" other than the telephone?

A. A radio station has a great deal of technical equipment. I was informed by the watchman on nights previous Mr. Clark had been previously there trying to play records for his own amusement.

Q. That might have been something that might have been going out over the air?

A. Very possibly, yes. If he turned on the switch, it went on the air.

Q. And all of this came through the watchman and you had no [165] personal knowledge of it?

A. No, sir.

Q. So, the night in question, all you saw him using was the telephone? A. That's right.

Q. There is no F. C. C. rule against the use of the telephone in the station, I take it?

A. Not that I know of.

Q. So then, actually the question on the night we refer to was not of a serious nature?

A. Other than the fact that he was in the station when the station was closed.

(Testimony of Ralph Click.)

Q. Did you subsequent to that—could you give us the approximate time that Mr. Hamaker or anyone else in authority in the station gave you instructions not to leave anyone into the station other than the chief engineer or the Manager?

A. Shortly after we were on the air, March the 9th, 1947.

Q. You don't recall the specific occasion?

A. No, I don't.

Q. Do you recall the statement made by Mr. Barnett when he talked with you about Mr. Clark—do you recall the statement made to Mr. Barnett that you would no longer as chief technician be responsible for any of the technical equipment in the station?

Did you make such a statement? [166]

A. I did.

Q. Do you think that was in keeping with your position as chief technician?

\* \* \*

A. Under the circumstances, I thought it was right. If everyone in the station were permitted to come down there after hours, turning on equipment, I felt I had the right of no longer having the responsibility of taking care of it.

Q. (By Mr. Blair): Well, we just got through going over this matter, Mr. Click. I'll refresh your memory.

Now, to the best of your knowledge personally, you had no knowledge that Mr. Clark or anyone

(Testimony of Ralph Click.)

else had been playing around with the equipment at night?

A. All I had was information given to me by the watchman who informed me that Mr. Clark had been there and using the equipment.

Q. But you had no personal knowledge?

A. No, sir.

Q. Wouldn't it have been better for you to have referred the matter to the station Manager under the circumstances when the man was not actually a member of your department? [167]

\* \* \*

Q. (By Mr. Blair): What was the particular occasion on which someone in authority, and who in authority, by the way, made this statement to you about pay raises at the time the station went on the air? A. Mr. Reinholdt.

Q. And what did he specifically tell you about that?

A. He didn't tell it to me in person. It was more or less general information for all of the employees.

Q. How did you get the information?

A. From Mr. Reinholdt.

Q. Well, if he didn't tell it to you, how could you get it?

A. I didn't say that. I said he didn't tell it to me alone. It was information that he passed out to all the employees that as soon as the station got on its feet we would receive a regular semi-yearly increase.

(Testimony of Ralph Click.)

Q. Did he say a regular semi-yearly raise?

A. Words to that effect, yes.

Q. Well, did he say that?

A. Words to that effect.

Q. That isn't what I want to know.

What specifically did he say, do you remember?

A. I don't remember.

Q. You don't remember exactly what he said, so he could have said something else? [168]

A. He could have, yes.

Trial Examiner Parkes, II: What was the general nature of his statement?

The Witness: That was the general nature of the statement.

Q. (By Mr. Blair): Did you make the statement that Mr. Liebman was hired over your objections? A. I don't recall it.

Q. Do you recall when Mr. Liebman was hired?

A. I do.

Q. Did you have objections to his being hired at the time? A. I did.

Q. Did you have some specific reasons?

A. The reason given was that I thought it was uneconomical to the station to employ another sports announcer when we had one who was very capable of taking care of any sports programs.

Q. Was he working in your department?

A. No, he wasn't.

Q. What was your interest in the matter?

A. I was asked by the Manager what I thought of it.

(Testimony of Ralph Click.)

Q. Then, as Manager of the station, Mr. Barnett was interested in your opinion as to the operation of your particular department and the people surrounding it?

A. He must have been, yes, sir. [169]

\* \* \*

Q. (By Mr. Blair): Do you feel that Mr. Barnett had considerable faith in you in asking you whether Mr. Liebman should be hired?

A. Well, I wouldn't say that.

Q. Previous to the election that was held on August 29th, had Mr. Barnett at any time by any means threatened you in any manner?

A. No, sir.

Q. Had he ever suggested to you that anything might happen should you go along with the union?

A. No, sir.

Q. So that up to the time that you voted in the election, there was nothing that Mr. Barnett said or in Barnett's manner that would indicate that he would do anything in the form of any reprisal to you because of the National Labor Relations Board election or your voting in it?

A. Nothing other than the fact that it put a brown taste in his mouth.

Q. What did that comment mean to you? [170]

A. Well, it meant that he—that meant that he was after my scalp.

Q. I'd like to be informed on this. This is new to me.

How does the statement, it didn't leave a good

(Testimony of Ralph Click.)

taste in his mouth, indicate to you that he was after you?

A. It was the part that he added on after that statement, that he wouldn't rest until he got it out.

Q. Until he got what out?

A. The dark brown taste in his mouth, the bad taste in his mouth.

Q. Well, how did that reflect upon you? Did he say to you specifically:

“Ralph Click, if this happens, I'm going to do something to you.”

A. No, he didn't.

Q. So then, the dark brown taste beyond being a comment of his did not indicate that he was going to do anything to you personally?

A. No, sir. [171]

\* \* \*

Trial Examiner Parkes, II: A thought occurred to me a while ago.

The complaint alleges that the Respondent is an Oregon corporation.

Will Counsel stipulate to that?

Mr. Blair: We will.

Mr. Merrick: I had meant to strike the paragraph as an unnecessary plea.

At this time, Mr. Examiner, the General Counsel rests his case. However, we may desire to call rebuttal witnesses if necessary. [172]

\* \* \*

EDWARD P. BARNETT

a witness called by and on behalf of the Respondent, having been previously sworn, was recalled and testified as follows:

Direct Examination

By Mr. Blair:

Q. Mr. Barnett, did you at any time since your taking over the position of Manager of Station KWIN issue instructions to Mr. Ralph Click that he was not to supervise or to discharge, hire or discharge any employee?

Mr. Merrick: Wait a minute. I'm going to object to this question at the outset, not that I have any particular objection to this one, but I want to object to these leading questions.

This witness is no longer on cross-examination and I think that the witness himself should testify.

The question itself is leading. It's framed in such a manner that it puts the answer in the witness' mouth.

Q. (By Mr. Blair): Mr. Barnett—rephrasing the question for the moment—would you tell the Trial Examiner just what instructions, if any, you gave Ralph Click in regard to his job as supervisor after taking over the job of Manager of the station?

Mr. Merrick: I'll object to the use of the term "supervisor." That's an assuming fact, not in evidence. That's for the Board to determine whether or not this man is a supervisor.

Trial Examiner Parkes, II: Well, that's one of

(Testimony of Edward P. Barnett.)

the issues [173] in the case, but the question may stand.

The witness may answer.

A. As I stated in my previous testimony, there are certain circumstances under which a department head, such as the chief engineer, can fire a man, the same type of circumstances that this one man that was mentioned, Maston, had been fired before.

It is true, even at that time, that the chief engineer at the station could not in the presence of the Manager walk in and fire a man.

The situation was never that, but there are certain circumstances in which he can, and those circumstances are situations that have never been revoked.

Q. (By Mr. Blair): Was Mr. Click given the prerogative of being an actual chief in every sense of the word in your absence?

A. Yes. When I first took over as Manager of the station, one of the first things I did was talk to Mr. Click because, realizing I was no technician myself, I had to give him full range as far as the technical end of the station was concerned. I mean, I had no choice. I was going to have to put a lot of responsibility into his hands, I told him, because I'm no technician myself.

Q. On this particular occasion—I take it there are two of them—but on the occasion when the status of Mr. Clark as an employee of the station



(Testimony of Edward P. Barnett.)

at night came about, did you talk to [174] Mr. Click in a rather commonplace tone?

A. You mean when I questioned his reasons for making Clark leave the premises, is that the occasion?

Q. Right.

A. Yes, in a very normal tone.

Q. Did he relate to you at that time that there was a question raised by other operators as to Clark's using equipment at night?

A. No, to my knowledge there was nothing stated outside of the fact that he didn't think any personnel should be in the station after eleven o'clock.

Q. He made no charge against Clark using equipment at that time?

A. With the exception of the telephone.

Q. Do you recall the statement that Mr. Click made to you at that time when you advised him that Mr. Clark shouldn't be in the station?

A. Yes. He said, "If that's the policy of the station, I will no longer be responsible for the technical equipment, the condition of the technical equipment at the station from that date on."

Q. What would you take that to mean? [175]

\* \* \*

A. Well, I took it to mean exactly what he said, that he would no longer be responsible, and his job was to be responsible.

Q. (By Mr. Blair): Who then, other than Click, was to be responsible?

(Testimony of Edward P. Barnett.)

A. His replacement.

Q. At the time you called Mr. Click in to tell him he was through, which I take it was the date of September 2nd, could you relate for the benefit of the—I might put in a comment here—you have heard the testimony in regard to that meeting, will you tell in your own words, tell the Trial Examiner what occurred at that meeting?

A. Yes, I called him in. It was in the late afternoon, approximately—well, between four and four-thirty. I called him in and said I was going to have to let him go, and he said—or words to the effect, what are the reasons or why he's being discharged.

And I told him that he was inefficient, dishonest; he had caused dissension among the employees, I felt; and that I wanted him to leave—I had a check for him—and I wanted him to get out of the station right away.

The reason for that was the fact that I didn't feel it was good for the station to have a discharged chief engineer [176] at the station. We were on the air at the time.

It wasn't necessarily a reflection against the man himself at that time, but I didn't want to take the chance. That's all.

I mean, after all, I had discharged him—I'll say at four-thirty—and to rest in my own mind, I just as soon he was out of the station in as quick a time as possible. Considering the fact that the rest of the

(Testimony of Edward P. Barnett.)

employees were off at five, I wanted him to go by that time.

Q. What was your manner of speaking, or your manner of treatment at that time?

A. I considered it normal. I mean, I didn't raise my voice.

Q. You don't consider your ears were white at the time?      A. No.

Q. Was the reference made that you were mad?

A. No, I wasn't mad. I'll tell you, there's no employer that ever discharged a man with a normal feeling. I mean, I don't like to discharge a man, but I wasn't mad, upset, I imagine so. I believe that would be normal under the circumstances.

Q. At the time that you replaced Ralph Click with Phil George, did you know that he hadn't had previous experience?

A. I knew of his service experience, yes, and I knew of his schooling.

Q. Would it have been proper, or was it proper for you to [177] put him in charge of the station? Did his license qualify him?

A. His license did, yes.

Q. So, therefore, as long as you were satisfied with his qualifications and he had the proper license, he was at least in the eyes of the F. C. C. entitled to handle the job?      A. Yes.

Q. Do you remember of any time of your complimenting Click for his good work?

A. There was bound to be times with any employee as long as he's with you.

(Testimony of Edward P. Barnett.)

Q. Other than the incident relating to the credit card, do you recall having criticized him for certain operations?

A. Yes, I had to criticize him. I had to criticize him for—well, in this particular case here, the Wallace Clark deal. I criticized him for the credit card.

I don't recall any particular incident that I called him in and laid him out about anything. Normal corrections, I mean actually they're corrections without being criticisms.

You can correct a man without criticizing him.

Q. At the time you discharged Click, could it have been said that he was cold to all of the facts in the case that you related to him at the time you discharged him?

A. The facts were known to him. Is that what you mean?

Q. Did he know those facts from previous discussion with you? [178]

A. Oh, yes.

Mr. Blair: That's all.

### Cross-Examination

Q. (By Mr. Merrick): Right on that line of questions, what previous discussion did you have with Click regarding these facts that he referred to?

A. Well, I had discussed the credit card situation. I had discussed the time when he had ordered Clark out, and I discussed his attitude shown when

(Testimony of Edward P. Barnett.)

I tried to find out the reason for putting the man out the previous night.

Q. Those are the two instances you speak of?

A. Yes.

Q. Now, I believe you testified that when you questioned Click regarding this trouble with Clark, he said that no other personnel should be in the station after eleven, is that right?

A. Yes, outside of the night man.

Q. In other words, it was his recollection there was some rule to that effect?

A. In his own mind, yes.

Q. Did you set him straight on it?

A. I did.

Q. Now, did Mr. Click have any other further trouble with Clark after this one incident you refer to?

A. Not to my knowledge, no. There might have been something between them, but it wasn't brought to my attention. [179]

Q. And did Clark leave the station some time in June?

A. He left a short time after that, yes.

Q. And what was the caliber of Click's work after Clark left?

A. After Clark left, the caliber of his work regarding the wire equipment?

Q. Maintenance of equipment, and all of his work that he was required to do.

A. Well, of course, I believe it was after Clark left that the rodeo situation came up. I believe, if

(Testimony of Edward P. Barnett.)

I remember right, that came up after Clark's dismissal. I forget the exact time that he quit.

Q. Well, what was the caliber of his work after the rodeo situation?

A. After the rodeo situation, his work seemed all right.

Q. But then all during this time, were you thinking of firing him?

A. As I said, the idea was, he was scheduled for release. Naturally, I kept my eye open as to what was going on after I felt as though I should hold on to him until he physically recovered.

Q. Well, was there any particular reason why you picked Friday, September 2nd, at 4:20 to fire him, to notify him?

A. Well, I wanted to wait until after the election. No, I mean, I just took that date. I wanted to wait for a few days after the election to see if anything came up from it. Nothing [180] did. So, he was just released on the second of September.

Q. As a matter of policy, don't you give two weeks notice to people you're discharging or laying off?

A. When they are discharged for cause, no.

Q. How about when they are discharged without cause?

A. Discharged without cause?

Q. Laid off, for example.

A. It's a situation that never came up.

Q. Do you have any policy on it?

A. I would say that if they are just laid off

(Testimony of Edward P. Barnett.)

that they would normally be laid off with notice.

Q. You require ordinarily notice from people who are quitting, do you not?

A. Yes, I expect it.

Q. Two weeks' notice?                      A. Yes.

Q. Now, regarding this conversation on the date that Mr. Click was discharged, was the complete conversation, as far as you're concerned, he was inefficient, dishonest, caused dissension, and you had his check for him when you told him to get out, is that it?                      A. Yes.

Q. Nothing was said about the Clark incident, regarding the cartridges, and so forth?

A. I don't believe that I went into detail, [181] no.

Q. Nothing was said about the rodeo?

A. No.

Q. And nothing was said about wilful neglect of duty?

A. Outside of the fact that I considered that he had been wilfully neglectful.

Q. Nothing was said about incompetence?

A. Yes, I did tell him that I thought he had been incompetent.

Q. Is there anything else that you'd like to add to that statement?

A. Not that I can recall, no.

\* \* \*

Q. (By Mr. Merrick): What was it you said, there was no reflection on Click, that you just couldn't take the chance any longer?

(Testimony of Edward P. Barnett.)

A. Oh, yes. I stated the reason I told him to leave the premises as soon as I did was the fact that I didn't feel as though a discharged chief engineer should be on the premises [182] any longer than possible.

I wasn't referring necessarily—I mean I wasn't reflecting on the man right then—I mean, to me he was a chief engineer who had been discharged and should be off the premises right away.

I figured that his frame of mind wouldn't be such that he could work to the advantage of the station on the premises for very long.

Q. Do you think your endorsement of unsatisfactory on his license was warranted under the circumstances?      A. Absolutely.

Q. Since receiving this communication from the Federal Communications Commission, do you still have that viewpoint?      A. Absolutely.

Q. Did you check to find out what unsatisfactory actually meant in this instance?

A. Oh, yes.

\* \* \*

Q. (By Mr. Renoud): Mr. Barnett, as Manager of the radio station, you are familiar with the F. C. C. requirements to hold your license, to hold the station license?      A. Yes.

Q. Is it your impression that under the F. C. C. license, anybody can come in and have access to the broadcasting equipment there? [183]

A. If anything goes wrong if the station is on the air. At a time when they're not supposed to



(Testimony of Edward P. Barnett.)

be, or something of that nature, that would be against the Commission's regulations, yes. [184]

\* \* \*

Q. (By Mr. Renoud): To your knowledge, is non-licensed personnel permitted to have access to the broadcast equipment?

A. A licensed person should be on hand with the equipment, while the equipment is being used for broadcasting.

If the equipment is idle, if the transmitter is turned off, we do not have to have a licensed man on the premises.

\* \* \*

#### MARK S. HAMAKER

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Blair:

Q. For the benefit of the record, Mr. Hamaker, will you give your full name and title?

A. Well, it's Mark S. Hamaker, and I am President of the Rogue Valley Broadcasting Company, Incorporated.

Q. You live where?

A. 324 Norton Street, Ashland, Oregon.

Q. As President of the Rogue Valley Broadcasting Company, do you issue certain instructions from time to time to Ed Barnett as Manager?

(Testimony of Mark S. Hamaker.)

A. No, nothing relative to the operation of the station, just the—more or less—the financial management and the over-all operation and results of the station.

Q. Have you ever given specific instructions on the operation of the station to Mr. Reinholdt?

A. No.

Q. Have either of these gentlemen ever conferred with you about certain things in regard to the operation of the station? Such as, the discharge of employees?

A. Yes, more or less in a side manner, you might call it. It wasn't the purpose of the contact to discuss any hiring or firing.

Q. Did Mr. Barnett ever have occasion to discuss with you the matter of the discharge of Ralph Click?

A. Mr. Barnett told me that he was going to have to replace him. [186]

Q. Do you recall about what time that that took place?

A. Well, that was some time in early June. I don't remember the exact date.

Q. Previous to any indication by anyone that the union was interested in organizing the employees?

A. Yes, it absolutely was. I had heard nothing of any union activity of any nature at the time, or in fact some time after that.

Q. Did you give Mr. Barnett any specific instructions at that time?

(Testimony of Mark S. Hamaker.)

A. Well, nothing more than I told him that was the thing to do, if he wasn't satisfactory, to let him go.

Q. Did you talk with Mr. Barnett at any time after that about the same situation?

A. Oh, yes.

Q. Will you relate that?

A. Ed said he was going to have to let him go. So at some time after that—I don't remember how long—I heard Ralph on the air again, and the next time Ed was up, why, I said, "I thought you were going to fire Click."

Then he went ahead and told me the story about his appendix and his appendicitis. He told me, he says, "I just haven't got the heart to fire a man while he's in the hospital, down on his back," and he says, "give him a chance to get back on his feet and then," he says, "I'll let him go." [187]

Q. Do you know if that was carried out?

A. Yes, it was.

Mr. Merrick: What was carried out?

The Witness: The discharge of Mr. Click.

\* \* \*

Q. During the first conversation you had regarding the discharge of Mr. Click, which occurred some time early in June, was the matter of the unionization of the station discussed at the same time? A. Oh, no.

Q. You hadn't heard anything about it?

A. No, I didn't know anything about it, never

(Testimony of Mark S. Hamaker.)

been anything mentioned about it. I never heard anything about it.

Q. So, the first you knew about it was some time later when the communication was received from the National Labor Relations [188] Board, is that correct?

A. That's right. Ed notified me when he got this letter, he told me.

Q. Has it ever been the practice of either yourself or any of the Directors of the company to set up policies for the station and its operation?

A. No.

Q. That is, as to who might enter the station premises and who might not? A. No.

Q. I take it by that answer that it was left entirely to the Manager of the station to make those decisions? A. Yes, it was.

Q. That was his responsibility?

A. Yes.

Mr. Click made the statement that I had instructed him to not permit anyone to enter there after eleven o'clock.

Well, if I ever made that statement, it's certainly beyond my knowledge. I have no recollection of ever making such statement.

Q. You never issued any order of any kind as far as the actual operation of the station?

A. No, not to my knowledge.

Q. Did Mr. Click ever approach you personally during any of the time that you might have had a conversation with him? [189]

(Testimony of Mark S. Hamaker.)

A. Oh, yes. He'd come up and cry on my shoulder every once in awhile. I'd send him right back to the station manager. I told him that I wasn't running the station, that I had men hired down there to do it, that is, the corporation did, and that if he had any troubles, why, get them ironed out with them.

I wasn't mixing up into it at all.

Q. Was that true while Mr. Reinholdt was manager? A. Yes.

Mr. Blair: That's all.

### Cross-Examination

By Mr. Merrick:

Q. That was also true during Mr. Reinholdt's tenure? A. Yes.

Q. Where is Mr. Reinholdt now?

A. Sitting right there (indicating).

Q. Did the discharge of Ralph Click have to be cleared with you before it became effective?

A. No, there is no hiring or firing through any of the corporation, that has to be approved by any of the corporation heads.

That's entirely up to the station manager.

Q. Well, as a matter of fact, was it though?

A. Oh, yes.

Q. It was? A. Yes. [190]

Q. Then, it was cleared through you?

A. What is it?

Q. The discharge was cleared through you?

A. No, it was not. There has never been any dis-

(Testimony of Mark S. Hamaker.)

charge of any employee that had ever been cleared through me other than the station manager.

Q. However, they did confer with you?

A. He mentioned it, but he was not there on that particular business at all. Actually, he did, yes, he mentioned it.

Q. Do you have anything to say about the discharge on September 2nd—did you have anything to say about the discharge of Click on September 2nd?

A. No, I never had anything to say about the discharge of anyone at any time.

Q. Do you know if the corporation has any policy regarding the discharge?

A. They have no policy. That's entirely up to the station manager. That is, that's their policy.

\* \* \*

### ROBERT E. REINHOLDT

a witness called by and on behalf of the respondent, being [191] first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Blair:

Q. Will you state your full name for the record?

A. Robert E. Reinholdt.

Q. Your residence?

A. 605 Elkader, Ashland.

Q. Your occupation at the present time?

(Testimony of Robert E. Reinholdt.)

A. I'm a partner in a general insurance agency, in Ashland.

Q. How long since you've been manager of Station KWIN?

A. I left the station on September 1st, 1948.

Q. Were you the one who, as station manager, employed Ralph Click? A. I was.

Q. He had worked with you previously?

A. Yes, we were both on the same staff at KWIL in Albany.

Q. Will you relate to the Trial Examiner the method of procedure in hiring Mr. Click and what his duties were to be when he was hired?

A. Well, I came to Ashland the fore part of December of 1946 to manage the station and had been there ten days when the station burned, and prior to that time, during that ten days, I noticed some dissension on the staff, relating to the staff, and the relations with the staff and the chief engineer at the present time, and I wasn't too satisfied with him. [192]

Following the fire, we were obliged to rebuild the station, and so, knowing that this man, as has been brought out previously here, occasionally was a drinker, I thought that I had better have someone on the staff that I knew was able to help me and help the existing chief engineer rebuild the station, and eventually step into his shoes should something come up in a way that would lead to the existing chief engineer's discharge.

That occasion came about after the station was

(Testimony of Robert E. Reinholdt.)

on the air—back on the air following the fire. The man was drinking on the job, and he was being discharged and Mr. Click replaced him on the job.

Q. What status did Mr. Click have after he was placed on the job—I believe in Mr. Rush's place?

A. Yes, he was appointed chief engineer on Mr. Rush's discharge.

Q. What authority was he given by you as manager of the station at that time?

A. Well, the way that I had the station set up, it was on the basis of three departments actually; first of all, the sales department, the program department, and the engineering department.

Mr. Click was to have complete charge of the engineering department. He was charged with the equipment. While it didn't need much maintenance, since it was brand new equipment, he was [193] to take care of any necessary work on the equipment, service it and take care of the operation of the technical end of the station.

Q. Was he given initial compensation for his services as chief?      A. Yes.

Q. That is, in relation to the other operators?

A. Yes, he was paid a higher rate of salary than the other operators. To my recollection, on his appointment as chief engineer, his salary was raised at least to the point where the former chief was. I don't recall just exactly what the figure was.

Q. During the time you were manager, did Mr. Click have occasion to fire at least one employee?

A. Yes, he did.



(Testimony of Robert E. Reinholdt.)

Q. Was that with your final approval?

A. Yes, it was.

Q. And at any time subsequent to that, did you take away from him any authority to do likewise?

A. No, sir.

Q. Then, to your knowledge, no authority was taken away from him during your term as manager of the station?

A. During my tenure at the station, he had that authority to fire an operator that was obviously disregarding the rules of the operation of the station. The head of the department [194] was to oversee that.

When he came on the job in this particular instance and this man was drunk, he did exactly right by setting him loose.

Q. Was Mr. Beckett on the job at the time you left or before you left?

A. He was on the job before I left. I hired Mr. Beckett.

Q. Do you recall anything surrounding the circumstances of his discharge or lay-off? Was that done by Mr. Click or by yourself?

A. Well, Mr. Beckett was discharged when Mr. Barnett was manager of the station as I recall.

Q. That was some time after you had left?

A. Yes.

Q. Was Mr. Click required to do any amount of traveling for the station during the time you were manager.

A. The traveling that Mr. Click did when I was

(Testimony of Robert E. Reinholdt.)

manager of the station, with the exception of during football season when he generally traveled with me in my car, with only one exception that I can remember, and that was a trip that he had to make to Monmouth—the traveling that he did was merely from town to the station and to the various locations. Perhaps we'd have one in Medford more often than it was in Ashland, that is, remote equipment, and maybe once or maybe twice a week to Medford to the radio parts supply house that's located here.

Q. Was he ever compensated in any extra manner for any of [195] these trips, or was that supposed to be taken care of by his normal salary?

A. Well, not directly, no. I can recall one instance where we went to San Francisco following the football season and during the football season as kind of a bonus. I don't remember all of the facts surrounding that.

When we traveled, of course, his expenses were paid, and when I was manager of the station, we kinda had the operation of the station set up on every man more or less doing his job, and if it took five hours today to do it, fine, or ten hours, why, that was fine too.

Q. Did Mr. Click ever complain to you that he should have been paid for any of his traveling that he did?

A. Once in a while—or I shouldn't say it that way. I should say once or twice perhaps he came in and asked for extra gasoline. We usually worked something out on that.

(Testimony of Robert E. Reinholdt.)

Q. So that every time he asked for anything additional that he felt he was entitled to, in some maner or means he was compensated for it?

A. We tried to do that, yes.

Mr. Blair: That is all.

### Cross-Examination

By Mr. Merrick:

Q. What did you say your business was at the present time?

A. I'm a partner in a general insurance [196] agency.

Q. Do you have any financial interest in this broadcasting company?      A. No, sir.

Q. Does your partner?

A. Yes, he is on the Board of Directors.

Q. Who is this chief who was working down there when you first went to KWIN?

A. Floyd Rush.

Q. Did you credit Click's statement that he was a drunkard?

A. Well, I—put it this way that he was an alcoholic.

Q. On rebuilding the station, did he do much of the work himself?

A. Quite a bit. I think that—my recollection is he was primarily responsible for it. Ralph was working with him. They were more or less on a share and share alike basis. I remember there were some arguments on whose ideas should go where

(Testimony of Robert E. Reinholdt.)

and, in other words, one man—Click would get an idea certain things should be done one way, and Rush would get an idea that the same thing should be done another way.

I don't have technical background. It was up to me to more or less weigh the thing and make a decision on it, probably a fifty-fifty proposition.

Q. Well, you brought Click down to make sure the job was done correctly?

A. That's right. [197]

Q. And you have no knowledge of the radio business from a technical standpoint, do you?

A. Other than just a superficial knowledge.

Q. In other words, you were depending on Click?

A. That's right, and he came down with that understanding that I was depending on him.

Q. Now, I'd like to call your attention to the answer of the respondent in General Counsel's Exhibit 1, and referring to the paragraph starting: "That on December 31, 1947, the said Ralph Click . . ." had the right to hire and fire in the absence of the station manager.

Is that statement correct?

A. As far as the period of time that I was at the station, it is essentially correct. As to hiring or firing by the chief engineer, it would be done ordinarily only in case of an emergency.

Q. Or when you were absent?

A. That's right.

(Testimony of Robert E. Reinholdt.)

Q. Was Mr. Barnett present during this time that you were absent? A. I don't recall.

Q. Were you consulted with regard to the drawing of this pleading?

A. No, the only people that have contacted me in this has been an N. L. R. B. man. [198]

Q. How many times did you leave the station when Click was employed there—I mean, for trips, and so forth, when you left him in charge?

A. Well, that's a hard question to answer. For one reason, during that period of time, my mother was ill in Salem, and I was making frequent trips up there. Another reason, there were several meetings that had to be attended.

I just can't recall. They were numerous times.

Q. And you'd leave Click in charge of the station?

A. That's right. He was in charge of the actual operation of the station. It was his responsibility to see that the station got on on time in the morning, got off on time at night, and see that the operators did their work properly, and other than that he had nothing to do with the commercial end of the station, the sale of time, or any of that part.

Mr. Merrick: That's all I have.

### Redirect Examination

By Mr. Blair:

Q. Will you tell me just exactly what you meant when you said that Walt came down from Albany—

(Testimony of Robert E. Reinholdt.)

you stated in your previous testimony—in order to be on the safe side, did you actually bring him down to supervise, or did you bring him down because you were worried you might run short if this man went off on a drunk—I'd just like to have it clear in my mind as to what the exact reason was you brought Click down from Albany at the time you reconstructed the station. [199]

A. In those days, at that particular time, first-class radio operators with experience were very difficult to obtain. The only way you could get a man really was to get him out of a school unless you happened to come upon someone who was qualified to act as a chief engineer.

At that time, the only man who was qualified on the staff to be chief engineer was Floyd Rush, and knowing of his condition, I wanted to have a man in the background that could move in and safely take over the controls of the station so far as the chief engineer's post was concerned if something happened to Mr. Rush.

And that was the main object in hiring him, and I told him so at the time and he understood it. In fact, I made that representation to him, should something go wrong with Mr. Rush, that he would be made chief engineer.

\* \* \*

Received September 5, 1950. [200]

In the United States Court of Appeals  
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,  
  
Petitioner,  
  
vs.

ROGUE VALLEY BROADCASTING CO., INC.  
(KWIN)  
  
Respondent.

CERTIFICATE OF THE NATIONAL LABOR  
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings had before said Board, entitled, “In the Matter of Rogue Valley Broadcasting Co., Inc. (KWIN) and Local No. 49, International Brotherhood of Electrical Workers, AFL,” the same being known as Case No. 36 CA-113 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceedings was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

- (1) Order designating Frederic B. Parkes II

Trial Examiner for the National Labor Relations Board, dated August 22, 1950.

(2) Stenographic transcript of testimony taken before Trial Examiner Parkes on August 22, 1950, together with all exhibits introduced in evidence.

(3) Copy of Trial Examiner's Intermediate Report, dated November 10, 1950 (annexed to item 12 hereof) ; order transferring case to the Board, dated November 10, 1950, together with affidavit of service and United States Post Office return receipts thereof.

(4) Union's telegram dated November 28, 1950, objecting to any extension of time for the filing of exceptions to the Intermediate Report.

(5) Respondent's letter dated November 27, 1950, requesting an extension of time in which to file exceptions.

(6) Board's telegram dated November 29, 1950, granting all parties an extension of time for the filing of exceptions.

(7) Respondent's telegram dated December 12, 1950, requesting additional time for filing of exceptions to Intermediate Report.

(8) Board's telegram dated December 13, 1950, denying respondent's request for any extension of time.

(9) Respondent's telegram dated December 14, 1950, requesting a further extension of time in order to file in support of exceptions.

(10) Board's telegram dated December 15, 1950,



granting an extension of time for the filing of briefs.

(11) Respondent's exceptions to the Intermediate Report, received December 19, 1950.

(12) Copy of Decision and Order issued by the National Labor Relations Board on March 27, 1951, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 24th day of July, 1951.

[Seal]      /s/ FRANK M. KLEILER,  
Executive Secretary, National  
Labor Relations Board.

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[Endorsed]: No. 13037. In the United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Rogue Valley Broadcasting Co., Inc. (KWIN), Respondent. Transcript of Record. Petition to enforce an order of the National Labor Relations Board.

Filed July 30, 1951.

      /s/ PAUL P. O'BRIEN,  
Clerk United States Court of Appeals for the Ninth  
Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 13037

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

ROGUE VALLEY BROADCASTING CO., INC.  
(KWIN),

Respondent.

PETITION FOR ENFORCEMENT OF AN  
ORDER OF THE NATIONAL LABOR  
RELATIONS BOARD

To the Honorable the Judges of the United States  
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Rogue Valley Broadcasting Co., Inc. (KWIN), Oregon, its officers, agents, successors, and assigns. The proceedings resulting in said order are known upon the records of the Board as "In the Matter of Rogue Valley Broadcasting Co., Inc. (KWIN), and Local No. 49, International Brotherhood of Electrical Workers, AFL, Case No. 36-CA-113."

In support of this petition the Board respectfully shows:

(1) Respondent is an Oregon corporation engaged in business in the State of Oregon, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on March 27, 1951, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, its officers, agents, successors, and assigns. The aforesaid order provides as follows:

### Order

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Rogue Valley Broadcasting Co., Inc. (KWIN), Ashland, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local No. 49, International Brotherhood of Electrical Workers, AFL, or in any other labor organization of its employees, by discharging and refusing to reinstate any of its employees or by discriminating in any other manner in regard to their hire and tenure of

employment or any term or condition of employment.

(b) Interrogating its employees in regard to their union sentiments; and threatening its employees with discharge or other economic reprisals because of their union affiliation or activities.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local No. 49, International Brotherhood of Electrical Workers, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Ralph S. Click immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Make whole Ralph S. Click, in the manner set forth in the section of the Intermediate Report entitled "The Remedy," for any loss of pay he may have suffered as a result of the Respondent's discrimination against him.

(c) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all pay roll records, social security payment records, time cards, personnel records and reports, and all other records necessary to an analysis of the amount of back pay due and the right of reinstatement under the terms of this Order.

(d) Post at its station at Ashland, Oregon, copies of the notice attached hereto and marked Appendix A.<sup>3</sup> Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

(3) On March 27, 1951, the Board's Decision and Order was served upon Respondent by sending

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<sup>3</sup>In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

By /s/ A. NORMAN SOMERS,  
Assistant General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 24th day of July, 1951.

[Endorsed]: Filed July 30, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH  
PETITIONER INTENDS TO RELY

In this proceeding petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. The National Labor Relations Act, as amended, is applicable to respondent.

2. The Board properly determined that the chief engineer at respondent's radio station was not a supervisor within the meaning of Section 2 (II) of the Act.

3. Substantial evidence supports the Board's findings that respondent questioned its employees concerning their union preferences, and threatened them in the exercise of their right of self-organization guaranteed by the Act.

4. Substantial evidence supports the Board's finding that respondent discriminatorily discharged Ralph Click in violation of the Act.

Dated at Washington, D. C., this 24th day of July, 1951.

/s/ A. NORMAN SOMERS,  
Assistant General Counsel.

[Endorsed]: Filed July 30, 1951.

[Title of Court of Appeals and Cause.]

### ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America  
To Rogue Valley Broadcasting Co., Inc., Radio Station (KWIN), P.O. Box 305, Ashland, Oregon; International Brotherhood of Electrical Workers, Local No. 49, AFL, 1417 S.W. 3rd Avenue, Portland, Oregon.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10 (e) ), you and each of you are hereby notified that on the 30th day of July, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on March 27, 1951, in a proceeding known upon the records of the said Board as

“In the Matter of Rogue Valley Broadcasting Co., Inc., (KWIN) and Local 49, International Brotherhood of Electrical Workers, AFL, Case No. 36-CA-113,”

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days



from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 31st day of July, in the year of our Lord one thousand, nine hundred and fifty-one.

[Seal]     /s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

Returns on Service of Writ attached.

[Endorsed]: Filed August 10, 1951.

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[Title of Court of Appeals and Cause.]

## ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America  
To International Brotherhood of Electrical Work-  
ers, AFL, 1200 - 15th Street, N.W., Washing-  
ton 5, D. C.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10 (e) ), you and each of you are hereby notified that on the 30th day of July, 1951, a petition of the National Labor

Relations Board for enforcement of its order entered on March 27, 1951, in a proceeding known upon the records of the said Board as

“In the Matter of Rogue Valley Broadcasting Co., Inc., (KWIN) and Local No. 49, International Brotherhood of Electrical Workers, AFL, Case No. 36-CA-113,”

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 30th day of July, in the year of our Lord one thousand, nine hundred and fifty-one.

[Seal]     /s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

Return on Service of Writ attached.

[Endorsed]: Filed August 13, 1951.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

In answer to the petition for enforcement of an order of the National Labor Relations Board, heretofore filed herein, respondent, by and through one of its attorneys, George M. Sennatt, respectfully states as follows:

That the Respondent, Rogue Valley Broadcasting Co., Inc., has notified the National Labor Relations Board that it is willing to and will comply with the decision and order heretofore made by said National Labor Relations Board; that the respondent Rogue Valley Broadcasting Co., Inc., has offered Ralph S. Click, Claimant in the National Labor Relations Board Case No. 36-CA-113, immediate and full reinstatement to his former, or substantially equivalent, position; that upon making said offer the said Ralph S. Click demanded that he be rehired as manager of the Rogue Valley Broadcasting Co., Inc.; that the said Ralph S. Click, after being informed of said offer of reinstatement, has failed to supply your respondent with the necessary data upon which to compute the loss of pay that may be coming to the said Ralph S. Click.

Wherefore, this respondent prays that this court

refuse to take jurisdiction of the proceedings and of the questions to be determined therein, for the reason that this respondent is attempting to comply with the decision and order of the National Labor Relations Board.

/s/ WM. M. BRIGGS,

/s/ GEORGE M. SENNATT,  
Attorneys for Respondent.

[Endorsed]: Filed August 17, 1951.

No. 13037

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**NATIONAL LABOR RELATIONS BOARD, PETITIONER**  
*v.*

**ROGUE VALLEY BROADCASTING Co., INC. (KWIN),  
RESPONDENT**

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**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

---

**GEORGE J. BOTT,**  
*General Counsel,*  
**DAVID P. FINDLING,**  
*Associate General Counsel,*  
**A. NORMAN SOMERS,**  
*Assistant General Counsel,*  
**FREDERICK U. REEL,**  
**THOMAS F. MAHER,**  
*Attorneys,*  
*National Labor Relations Board.*

---

**FILED**

**JAN - 9 1952**

**PAUL P. O'BRIEN**  
**CLERK**



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# **In the United States Court of Appeals for the Ninth Circuit**

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No. 13037

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

ROGUE VALLEY BROADCASTING Co., INC. (KWIN),  
RESPONDENT

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*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD*

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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## **JURISDICTION**

This case is before the Court upon petition of the National Labor Relations Board for the enforcement of its order issued against respondent on March 27, 1951, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, *et seq.*).<sup>1</sup> The Board's Decision and Order (R. 48-54) are reported in 93 N. L. R. B. No. 164. This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices in question having occurred at Ashland, Oregon, within this judicial circuit.

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<sup>1</sup>The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 29-33.

## STATEMENT OF THE CASE

**I. The Board's findings of fact and conclusions of law <sup>2</sup>**

Following the usual proceedings under the Act, the Board found that respondent is engaged in commerce within the meaning of the Act, that respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act, and that respondent discriminatorily discharged Ralph Click in violation of Section 8 (a) (3) of the Act. In so finding the Board rejected respondent's contention that Click was a supervisory employee outside the protection of the Act. The subsidiary facts upon which these findings rest may be summarized as follows:

**A. The interstate character of respondent's operations**

Rogue Valley Broadcasting Co., Inc., is an Oregon corporation with its principal office and place of business at Ashland, Oregon, where it operates Radio Station KWIN under license by the Federal Communications Commission, hereinafter referred to as the F. C. C. (R. 11-12; 100-102, 198).<sup>3</sup> The station is located approximately 15 air-miles from the California State line and broadcasts radio signals in interstate commerce, making its required monthly frequency check with the Radio Corporation of America station at Point Reyes, California, and utilizing

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<sup>2</sup> The Board adopted the findings, conclusions, and recommendations of the Trial Examiner with several modifications noted in its decision (R. 49).

<sup>3</sup> Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; subsequent references are to the supporting evidence.

the lines and facilities of the Pacific Telephone and Telegraph Co. (R. 11-12; 63-65, 180-184). The station uses these interstate lines to broadcast two programs originating in Los Angeles, California, regularly scheduled for 30 minutes each day, six days per week, and also local programs originating outside of the station (R. 12; 64). These so-called remote broadcasts represent 3½ percent of all broadcasting time of the station (R. 12; 97, 102).

Respondent's annual purchases total \$5,000, of which \$2,500 is paid annually to the World Broadcast, Inc. of Los Angeles, California, for the two programs transmitted to respondent's station (R. 12; 95, 101). The remainder is expended for the purchase of equipment for the station (R. 12; 95). Annual advertising revenue ranges between \$50,000 and \$60,000 (R. 12; 95-97). Over 50 percent of this revenue is derived from the advertising of nationally distributed goods and products, manufactured outside of the State of Oregon (R. 12; 98-100).

Upon the foregoing facts, the Board found that respondent was engaged in commerce within the meaning of the Act (R. 12).

#### **B. The unfair labor practices**

##### ***1. Background of labor relations***

In July 1949 Employees Ralph Click and Charles Fields expressed an interest in organizing the four employees in respondent's Engineering and Announcing Department (R. 17; 155-156). At a meeting with Renoud, a representative of the International Brotherhood of Electrical Workers, hereinafter re-

ferred to as the Union, both employees signed Union membership cards and authorizations to the Union to represent them, and took with them application cards with which to solicit the Union membership of the two other employees in the department (R. 17; 155-156). Thereafter Click enlisted the Union membership of Employee Donald Smith (R. 17; 174).<sup>4</sup> Upon receiving authorization cards from three of the four employees in the Engineering and Announcing Department, the Union notified respondent that it represented a majority of its employees, and that it had filed with the Board its petition for certification as the representative of the employees for the purposes of collective bargaining (R. 17-18; 73-74, 156). The Union likewise advised respondent that any attempt to discharge employees or to intimidate or coerce them would be viewed as an unfair labor practice and would be referred to the Board (*ibid.*).

Thereafter, on August 29, 1949, pursuant to the terms of a consent election agreement, the Board conducted an election among the employees in the Engineering and Announcing Department which the Union won, 3 to 1 (R. 20; 75).<sup>5</sup> On September 7 the Board certified the Union as the exclusive bargaining representative in the unit previously agreed upon as

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<sup>4</sup> Employee Philip George, the fourth employee of the department and the one ultimately selected by respondent to replace Click as chief engineer, testified that he did not join the Union (R. 125, 174).

<sup>5</sup> Employees Smith, Click and Fields each voted *for* the Union (R. 138, 144, 176); George, who replaced Click upon his discharge, did not reveal his vote but it is obvious that it was *against* the Union.

appropriate for collective bargaining purposes (R. 20; 76-77).

*2. Interrogation and other interference, restraint, and coercion of employees*

On the same day that the Union advised respondent of its claim to majority status and of its filing of a certification petition, respondent, through Station Manager Barnett, began a campaign of questioning the employees concerning the Union, and of conveying to them respondent's animosity towards it. Barnett called Click to his office and asked him what he thought about the Union (R. 18, 175-176). When Click replied that he thought it would be good for the employees, Barnett stated that anyone "who was not satisfied here, can quit" (R. 18; 175). He then expressed himself on the subject directly, saying, "we don't want any damn union around here. They leave a very bad taste in my mouth, and it would if you joined the Union behind my back" (R. 18-19; 175). Barnett concluded the interview by remarking that "he wouldn't rest until [the Union] died" (R. 19; 176).

Similarly, 10 days before the election, Barnett inquired of Employee Fields what he "thought about the Union" (R. 19; 144). When Fields stated that he favored it, Barnett told him that "he hoped that [Fields would] keep [his] views with the station and their ideas" (R. 19; 144). At about the same time Barnett also asked Employee Smith what he "thought about the Union" and how he would benefit by being a member (R. 19; 134, 141). Shortly thereafter Barnett sought out Smith and had a second conversation

with him about the Union. This time, in an attempt to dissuade Smith from his Union preference, Barnett showed him a letter from respondent's counsel which stated, in effect, that if the employees joined the Union they would be turning their bargaining powers over "to the Portland Local," would have no voice in the Union at all, and would be subject to regulations of outsiders (R. 19; 135). During the conversation Barnett also identified Employee Click as a moving force in the Union and hinted that Click would soon be discharged. Thus, in soliciting Smith's vote at the coming election, Barnett assured Smith that if he voted against the Union he "wouldn't have anything to fear from Mr. Click because he wouldn't be there" (R. 19; 135, 140-141). At about the same time Barnett also questioned Employee George as to his Union preferences (R. 19-20; 124).

The Board concluded that by such interrogation of the employees concerning their union preferences and by accompanying statements calculated to intimidate the employees and influence their vote in the pending election respondent, through Station Manager Barnett, interfered with, restrained, and coerced its employees and thus violated Section 8 (a) (1) of the Act (R. 20-21).

### *3. The discriminatory discharge of Ralph Click*

#### *a. Click's alleged supervisory status*

Respondent employed nine employees, exclusive of its station manager, Edward P. Barnett (R. 13; 65-68). Five employees were assigned to the commercial and program phases of the station's opera-



tions (R. 13; 67). The remaining four comprised the station's engineering and announcing department, and included Employees Fields, George, Smith, and Click, all licensed radio engineers (R. 13; 66-67). Click was hired in February 1949 by the then Station Manager Reinholdt, as an engineer and announcer (R. 163-164). In August 1947 he was designated Chief Engineer, a position he retained when Barnett succeeded Reinholdt in September 1948 (R. 21; 65, 68, 165). Click's primary duty, as prescribed by F. C. C. regulations, was the responsibility for maintenance and operation of the station's technical equipment (R. 14, 16; 69). In this respect he instructed other employees in the use of the equipment, directed necessary repairs, and, when necessary, engaged in the maintenance work himself (R. 14; 69-70, 94, 183-184). Like the other three employees in the department he was assigned to a regular shift as announcer and engineer operator (R. 14; 112-113). The work schedules upon which such assignments were based were prepared by Click but required the approval of Station Manager Barnett before they became operative (R. 92, 184), and according to Barnett, "as far as the announcers' set-ups were concerned \* \* \* [Click's] status was the same as the rest" (R. 14; 113). Click had no authority to authorize employees to work overtime except with Barnett's prior permission (R. 14; 184). In fact, Click's authority extended only to responsibility for the maintenance and operation of the equipment, and the making of minor routine purchases connected there-

with (R. 14; 68). Major purchases required Barnett's approval (R. 44; 68).

Click had no authority to grant wage increases (R. 14; 92, Tr. 39). His salary was identical with that of Employee Fields, a fellow member of the Engineering and Announcing Department, and was \$30 to \$50 per month more than the salaries of the two junior members of the staff (R. 14-15; 94). Click, however, had no knowledge of the salaries of the other men (R. 14-15; 185).

Barnett interviewed all new applicants for employment (R. 186), and had informed Click that "he [Barnett] would do all the hiring and firing at the station" (R. 15-16; 167). Employee George testified that he was originally interviewed by Reinholdt, Barnett's predecessor, and not Click (R. 128), thus corroborating Barnett's assertion that Click "was never given the right to hire \* \* \* outright" (R. 15; 90-91). Nor could Click effectively *recommend* the hiring of new employees. Illustrative of the absence of such power was Barnett's refusal to follow Click's recommendations that an applicant named Wyatt be hired as an operator, and that Lieberman, presently employed as an announcer at the station, not be hired (R. 15; 184-185). Similarly, Click possessed no authority to discharge or to effectively recommend discharges. Thus Barnett testified that in his absence the Commercial Manager of the Station, Bardeen, is in charge of the station, and that Click had been so informed (R. 15-16; 89-90). Click, who did have power to discharge under Barnett's

predecessor (R. 167), testified without contradiction that when he attempted to exercise it under Barnett by way of recommending the discharge of one Beckett, Barnett informed him that "he would do all the hiring and firing" and declined to follow Click's recommendation (R. 15-16; 167).<sup>6</sup>

During the course of the Board's representation proceedings respondent took the position that Click was not a supervisory employee. At a conference, held on August 29, 1949, between Barnett, representing respondent, a field examiner of the Board, and a representative of the Union, the Board's field examiner asked Barnett what respondent's position was regarding Click's status (R. 16; 158). Barnett replied that "Click's position, as Chief Engineer, in compliance with Federal Communications Commission regulations was to see that the equipment was maintained" and "he had no power to do anything else as laid out by the Act as a supervisory employee" (R. 16; 158-159). He agreed that Click should vote in the election, and at the election thereafter held

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<sup>6</sup>In certain respects the testimony of Barnett and Click was directly conflicting. Thus Barnett denied that the authority possessed at one time by Click (R. 91-92, 167) to discharge under emergency circumstances had ever been revoked (R. 91-92, 199-200), and also testified that Click had the authority to recommend hiring (R. 90). Insofar as the testimony was in conflict the Trial Examiner "upon the entire record and his observation of the witnesses" credited that of Click and found "Barnett's testimony unworthy of credence" (R. 16). "For obvious reasons, questions of credibility were for the trial examiner" *N. L. R. B. v. State Center Warehouse and Cold Storage Co.*, C. A. 9, No. 12,815, decided November 27, 1951. Cf. *Universal Camera Corp. v. N. L. R. B.*, 340 U.S. 474, 488, 496.

respondent did not challenge Click's ballot (R. 16; 159).

Upon the foregoing facts the Board concluded that Click did not possess supervisory status within the meaning of the Act (R. 16, 49).

b. The circumstances surrounding Click's discharge

Click was one of the two employees responsible for the organization of respondent's employees and for the advent of the Union at the station. In company with Employee Fields he first met with the Union's representative, and thereafter secured the Union membership of Employee Smith (R. 17; 155-156). He also solicited Employee George's membership without success (R. 125). Click's Union interest and activities were admittedly known to respondent's station manager, Barnett, who, as noted above, manifested deep hostility to the Union and, while attempting to influence Employee Smith's vote in the election, predicted Click's discharge (*supra*, p. 6).

On September 2, 1949, four days following the Union's success in the election, Barnett summoned Click to his office and without prior warning summarily dismissed him from respondent's employ, giving him twenty minutes within which to get out of the station (R. 22-23; 19, 110, 177-178, 207-208). Barnett told Click that he was discharged because he was inefficient, dishonest, uncooperative incompetent, unqualified, caused trouble and dissension among the employees, had talked to members of the Board of Directors behind Barnett's back, and had sought employment elsewhere (R. 22; 177, 202).

Immediately upon dismissing Click, Barnett went in to the control room, snatched Click's F. C. C. license from the wall, took it to his office and in his haste to remove the license from its frame cut away the padding with his pocket knife (R. 23; 177-178). He then indorsed the license "unsatisfactory" on the space provided for the radio station's indorsement of a license holder's services (R. 23; 177-178). Such an indorsement, Barnett conceded, would seriously handicap an engineer's future employment (R. 23; 78, 208). In Click's case he found it impossible to secure work as an engineer and eventually obtained a job as a truck driver (R. 162).

The Board, observing that Click was discharged without warning and that the reasons given him were couched in the most general terms, also noted respondent's knowledge of Click's union activity, its manifest antiunion bias, and Barnett's remark to Smith, when soliciting his vote against the Union, that he "wouldn't have anything to fear from Mr. Click because he wouldn't be there" (R. 38-39). Recalling that Barnett had also attributed Click's discharge to the fact that he was a troublemaker and a creator of dissension among the employees, the Board inferred that this characterization of Click was based upon the latter's union membership and activity, and constituted the true reason for his discharge (R. 38).<sup>7</sup>

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<sup>7</sup> The Board carefully considered the various grounds advanced by respondent to justify Click's discharge. It found none of them was the true reason. To avoid needless repetition we discuss these alleged grounds in the Argument, *inra*, pp. 19-27.

## II. The Board's order

Upon the foregoing findings of fact and conclusions of law the Board ordered respondent to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by the Act (R. 49-50). Affirmatively, the Board ordered respondent to offer reinstatement with back pay to Employee Ralph Click, and to post the appropriate notices of compliance with the Board's order (R. 50-52).

### ARGUMENT

#### POINT I

#### **Respondent is engaged in commerce within the meaning of the Act**

The undisputed facts relevant to the question of the Board's jurisdiction clearly demonstrate that respondent radio station is engaged in commerce, and that the unlawful conduct found affects commerce, within the meaning of the Act.

Respondent utilizes the facilities of the Pacific Telephone and Telegraph Co., admittedly engaged in commerce,<sup>8</sup> broadcasts signals capable of reception by an audience located beyond the California-Oregon state line, 15 miles distant from respondent's station, makes a periodic frequency check with a station located in neighboring California, and regularly broadcasts programs originating in Southern California and transmitted to respondent's station over the

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<sup>8</sup> *The Pacific Telephone and Telegraph Co.*, 55 N. L. R. B. 1361, 1362.

aforementioned interstate telephone facilities. Furthermore respondent derives over half its income from advertising goods manufactured outside the State of Oregon, and thus furthers the interstate shipment of such goods. And finally respondent's station operates under a license of and subject to the regulations of the Federal Communications Commission, a federal agency charged with the regulation of interstate "transmission of energy or communication or signals by radio."<sup>9</sup>

Upon these facts the Board's jurisdiction is firmly established under long recognized principles.<sup>10</sup> And indeed, independent of these facts, "it is clear," as this Court has stated (*N. L. R. B. v. Pacific Gas and Electric Co.*, 118 F. 2d 780, 786), "that a radio station is an instrumentality of interstate commerce."

Nor is it significant to a final determination of the Board's jurisdiction that a greater or lesser volume of respondent's business and activities is either "in commerce" or "affects" it. For, as this Court has but recently stated (*N. L. R. B. v. M. L. Townsend*, 185 F. (2d) 378, 382, certiorari denied, 341 U. S. 909) "unless the volume of commerce that may be

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<sup>9</sup> Communications Act of 1934, 48 Stat. 1064, as amended 50 Stat. 189; 47 U. S. C. 153 (e), 301.

<sup>10</sup> *N. L. R. B. v. Jones and Laughlin Corp.*, 301 U. S. 1, 31; *Santa Cruz Co. v. N. L. R. B.*, 303 U. S. 453, 464; *N. L. R. B. v. Virginia Electric Power Co.*, 314 U. S. 469, 476; *Mandeville Island Farms, Inc. et al. v. American Crystal Sugar Co.*, 334 U. S. 219, 229, 234, 236; *N. L. R. B. v. Weyerhaeuser Timber Co.*, 132 F. (2d) 234 (C. A. 9); *N. L. R. B. v. West Texas Utilities Co.*, 119 F. (2d) 683, 684 (C. A. 5).

affected is so slight as to bring into play the maxim *de minimis*, the applicability of the Act is not dependent upon the amount of commerce affected." Similarly, as the Court of Appeals for the Tenth Circuit has recently emphasized, "the Board is specifically empowered to prevent any proscribed unfair labor practice 'affecting commerce,' and whether any such unfair labor practices affect commerce is not to be determined solely by the quantitative effects of the activities immediately before us." *N. L. R. B. v. Tri-State Casualty Insurance Co.*, 188 F. (2d) 50, 52. See also *N. L. R. B. v. Denver Building and Construction Trades Council*, 341 U. S. 675; *N. L. R. B. v. Fainblatt*, 306 U. S. 601; *N. L. R. B. v. Mid-Co Gasoline Co.*, 183 F. (2d) 451 (C. A. 5).

## POINT II

**Substantial evidence supports the Board's findings that respondent in violation of Section 8 (a) (1) questioned employees concerning their Union preferences and attempted to coerce them in the exercise of their right of self-organization guaranteed them by the Act**

The evidence detailed in the Statement of Facts—consisting in the main of admitted or undisputed testimony—fully supports the Board's findings that station manager Barnett questioned the employees about their Union interests and membership, observed that "we don't want any damn union around here" because "they leave a very bad taste in my mouth," and threatened that "he wouldn't rest until [the Union] died," and that anyone who was dissatisfied could quit (*supra*, pp. 5-6).



There is no doubt that such conduct constitutes an unfair labor practice within the meaning of Section 8 (a) (1) of the Act. Such "interrogation \* \* \* carries with it at least the aroma of coercion" (*Joy Silk Mills v. N. L. R. B.* 185 F. (2d) 732, 740 (C. A. D. C.), certiorari denied, 341 U. S. 914) and has been "uniformly condemned as violation of the Act" (*N. L. R. B. v. Norfolk-Southern Bus Co.*, 159 F. 2d 516, 518 (C. A. 4), certiorari denied, 330 U. S. 844). See also *N. L. R. B. v. Bradford Dyeing Association*, 310 U. S. 318, 327; *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514, 518; *N. L. R. B. v. J. G. Boswell Co.*, 136 F. (2d) 585, 590 (C. A. 9); *N. L. R. B. v. Lettie Lee, Inc.*, 140 F. (2d) 243, 245 (C. A. 9); *N. L. R. B. v. Ford*, 170 F. (2d) 735, 738 (C. A. 6); *N. L. R. B. v. M. A. Hanna Co.*, 125 F. (2d) 786, 788 (C. A. 6); *N. L. R. B. v. Minnesota Mining and Manufacturing Co.*, 179 F. (2d) 323, 326 (C. A. 8).

The rationale underlying the determination that the interrogation of employees constitutes an unlawful intrusion upon the freedom of self-organization was fully considered by the Board in *Standard-Coosa-Thatcher*, 85 N. L. R. B. 1358, at 1361. The Board observed in that case that interrogation "invades the employee's privacy and thus constitutes interference with his enjoyment of rights guaranteed to him by the Act." Its necessary effect "is to 'restrain' or to 'coerce' the employee in the exercise of those rights" by arousing in him the natural fear that the employer seeks the information in order to use it to the employee's detriment. Consequently, the Board

concluded, the employee is "in effect warned that any contemplated union activity must be abandoned, or he will risk loss of his job." The instant case illustrates the validity of the Board's reasoning; Barnett's statement that he wouldn't rest until the union died demonstrates the deliberateness of his purpose to defeat what he learned to be the employees' preferences.

Similarly it is well established that threats such as Barnett's remarks to Click that those who were dissatisfied could quit, and that he wouldn't rest until the Union died, were clearly calculated to coerce and restrain the employees in the exercise of their statutory rights.<sup>11</sup> Statements of such a nature have been consistently held to violate Section 8 (1), now Section 8 (a) (1), of the Act. *N. L. R. B. v. Schaefer-Hitchcock Co.*, 131 F. (2d) 1004, 1006-1008 (C. A. 9); *N. L. R. B. v. Lettie Lee, Inc.*, 140 F. (2d) 243, 245 (C. A. 9); *N. L. R. B. v. Sunshine Mining Co.*, 110 F. (2d) 780, 786 (C. A. 9), certiorari denied, 312 U. S. 678; *Peoples Motor Express v. N. L. R. B.*, 165 F. (2d) 903 (C. A. 4); cf. *N. L. R. B. v. Reeves Rubber Co.* 153 F. (2d) 340, 341 (C. A. 9).

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<sup>11</sup> The free speech provisions of Section 8 (c) of the amended Act grant no privilege or immunity to statements found to have been coercive. As this Court early stated (*N. L. R. B. v. Schaefer-Hitchcock Co.*, 131 F. 2d 1004, 1008), "the right of free speech cannot be invoked to coerce employees." For similar holdings under the amended Act see *N. L. R. B. v. Gate City Cotton Mills*, 167 F. 2d 647, 649 (C. A. 5); *N. L. R. B. v. Minnesota Mining & Mfg. Co.*, 179 F. (2d) 323, 326 (C. A. 8); *N. L. R. B. v. Kropp Forge Co.*, 178 F. (2d) 822, 827-828 (C. A. 7), certiorari denied, 340 U. S. 810; *N. L. R. B. v. La Salle Steel Co.*, 178 F. (2d) 829, 832 (C. A. 7), certiorari denied, 339 U. S. 963.

## POINT III

**Substantial evidence supports the Board's finding that respondent discriminatorily discharged Ralph Click in violation of the Act****A. Substantial evidence supports the Board's findings that Click was not a supervisory employee**

Respondent sought to avoid liability for the discharge of Click by contending that he was a supervisory employee and hence under Sections 2 (3) and (11) was outside the protection of the Act.<sup>12</sup>

The Board's findings with respect to Click's duties establish beyond question, however, that his role as chief engineer carried with it responsibility for the station's technical equipment (R. 68, 112-113), as distinct from responsibility for its normal operation by other qualified licensed engineers, and that Click was neither directly nor indirectly the responsible supervisor of his fellow employees. Thus, by Barnett's admission, Click's "status was the same as the rest" in the assignment of working schedules (R. 113), and he prepared work schedules only under Barnett's direction. His salary was no greater than that of Fields, who respondent admits is not a supervisory employee. Click had no authority to grant salary increases or to authorize overtime, and was not

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<sup>12</sup> Section 2 (11) of the Act provides that the term "supervisor" means "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

even informed of the salaries of employees allegedly under his supervision. He was specifically told that he had no authority to hire and fire (R. 167), and his recommendations for hiring and firing, when offered to Barnett, were rejected. And finally respondent itself conceded prior to the representation election that Click's position was "to see that the equipment was maintained" and that "he had no power to do anything else as laid out by the Act as a supervisory employee" (R. 159). Respondent affirmed this position by failing to challenge Click's ballot in the Board election.

Respondent argued that Click had at one time under a previous manager discharged an unruly employee, and his right to do so had never been specifically rescinded. It is clear, however, that such authority to discharge as Click may have possessed had been, in fact, rescinded by the present station manager, Barnett, when refusing to permit Click's discharge of an unsatisfactory employee, Beckett (*supra*, p. 9), or to accept Click's recommendation, Barnett told him "he [Barnett] would do all the hiring and firing" (R. 167).

The fact that Click had responsibility for the maintenance and operation of equipment in no way cloaks him with the status of a "supervisor" under the Act. The statutory language, quoted *supra*, n. 12, leaves no room for doubt that to qualify as a supervisor under the Act, one must supervise employees, not machines. Fully applicable here is the observation of the First Circuit with respect to a claim that cer-

tain "time study men" were supervisory employees (*N. L. R. B. v. Brown and Sharpe Mfg. Co.*, 169 F. (2d) 331, 334):

Thus it is not of consequence that Respondent's time study men have been found to possess authority to use their independent judgment with respect to some aspects of their work; the decisive question is whether they have been found to possess authority to use their independent judgment with respect to the exercise by them of some one or more of the specific authorities listed in Sec. 2 (11) of the Act as amended.

The evidence leaves no room for doubt that respondent neither relied upon nor invited Click's independent judgment upon any matter beyond his responsibility for the maintenance and operation of equipment. The Board's finding that Click was not a supervisory employee, and was therefore within the protection of the Act has ample support in the evidence.

**B. Substantial evidence supports the Board's finding that respondent discharged Click for union membership**

The evidence summarized at pages 10-11, *supra*, is clearly sufficient to support the Board's finding that respondent discriminatorily discharged Click for union activities, thereby violating Section 8 (a) (3) and (1) of the Act. The record establishes that respondent was aware of Click's union activities to which respondent was bitterly hostile, that Click was discharged shortly after the election at a time when Barnett admittedly had no fault to find with his

performance for the past six weeks (R. 118), that Barnett was nevertheless apparently very angry at Click, giving him 20 minutes to leave the premises and ripping his license from its frame, that Barnett had given Click no warning of his impending discharge, and that the "reasons" which Barnett vouchsafed to Click at the time consisted of vague generalities, more illuminative of Barnett's state of mind than of Click's alleged transgressions. While these circumstances in themselves constitute evidence from which the Board might reasonably draw an inference of discriminatory treatment,<sup>13</sup> here, as in *N. L. R. B. v. Bird Machine Co.*, 161 F. (2d) 589, 592 (C. A. 1), "the weight to be accorded the inferences drawn by the Board is augmented by the fact that the explanation of the discharge offered by respondent did not stand up under scrutiny."

*(1) Initial reasons advanced for the discharge*

Respondent's first attempt to explain its reasons for discharging Click was made in response to an inquiry from the Union a few days after the discharge.

<sup>13</sup> As to hostility to union, see *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347; *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 588; *N. L. R. B. v. Morris P. Kirk & Sons, Inc.*, 151 F. (2d) 490, 492-493 (C. A. 9).

As to precipitate manner of discharge, see *N. L. R. B. v. Bradford Dyeing Assn.*, 310 U. S. 318, 327, 329; *N. L. R. B. v. American Potash & Chemical Corp.*, 98 F. (2d) 488, 493 (C. A. 9), certiorari denied, 306 U. S. 643; *E. Anthony & Sons v. N. L. R. B.*, 163 F. (2d) 22, 26-27 (C. A. D. C.), certiorari denied, 332 U. S. 773.

As to failure to give employee reason for discharge, see *N. L. R. B. v. Wells, Inc.*, 162 F. (2d) 457, 459 (C. A. 9); *N. L. R. B. v. American Potash & Chemical Corp.*, *supra*.

Barnett repeated the vague statement already made to Click that he "created dissension among the men" and added that he "had not maintained the equipment properly" (R. 23; 159). These grounds were not pressed thereafter, and it is significant that at that time respondent made no mention of the allegedly more serious offenses it later urged.

*(2) Reasons given the F. C. C. to explain the discharge*

Thereafter in response to an inquiry from the F. C. C. as to why Click's license had been endorsed "unsatisfactory," respondent adverted to two incidents: an alleged failure properly to maintain a wire recorder for announcer Clark, who had repeatedly broken wire cartridges on this machine, and an allegedly poor reception of a rodeo broadcast. Since respondent later urged that it had decided to discharge Click *before* the rodeo episode, the Board properly found that that incident was not a significant factor in the discharge. Moreover, it appeared that Barnett had never discussed the matter with Click or with the announcers involved, and that other employees had no criticism to make of the broadcast and had heard none from Barnett (R. 33-34; 88, 125, 147). Under these circumstances the Board properly held that Barnett's reliance on the rodeo episode was but a pretext intended to conceal his real motivation for discharging Click.

The other reason reported to the F. C. C., Click's alleged mishandling of the wire recorder in May and June 1949, was likewise properly rejected by the Board as mere pretext for Click's discharge in

September. If, as Barnett claimed, the alleged improper maintenance of the wire recorder was of such significance that it should be reported to the F. C. C., it is reasonable to expect that he would have considered it so at the time it happened. Barnett admitted, however, that he never made any investigation of the matter; and Click testified without dispute that Barnett made no mention of the incident beyond mentioning that the repair cost "was getting to be exorbitant" (R. 27, 31; 87-88, 170). Thus, assuming respondent's factual account of the wire recorder incident to be accurate, it is difficult to understand why an incident that was so trivial when it occurred, suddenly became so important when Click had been discharged. Moreover, the testimony of Click and three other employees credited by the Board established that Clark, the announcer using the recording machine, mishandled it in such a manner as to break an excessive number of wire cartridges, and otherwise failed to follow out the instructions given him in detail by Click (R. 31; 136-137, 146, 152-154, 170-171). In view of this patent example of improper operation of equipment and of Barnett's admitted failure to investigate the difficulty himself, Barnett's accusation of Click addressed to the F. C. C. was obviously unfounded.

*(3) Reasons eventually advanced at the hearing to explain the discharge*

The discharge reasons advanced by respondent at the hearing a year later, while they clearly show that the initial reasons, considered above, did not accurately portray respondent's motivation, are even



less persuasive.<sup>14</sup> Thus, for the first time respondent contended that Click's objection to Clark's after-hours use of the station and its equipment, was *the* determinant cause for Click's discharge. Barnett testified that he intended to fire Click the Monday after he heard of this episode, but that Click's sudden illness caused Barnett to postpone the discharge "until the man was out of the hospital and back on his feet"; "to wait approximately 30 days" (R. 108). But the rodeo incident complained of to the FCC occurred within the next thirty days. If Click were well enough to do this rodeo broadcast, he would seem to be sufficiently "back on his feet" to be discharged, as planned. This inconsistent position, coupled with respondent's previous failure to mention the "after hours" incident, makes it clear that Barnett's determination to discharge Click in June or July 1949 was by no means as strong *then* as his year-old account of it at the hearing would make it appear.

A full consideration of the incident itself warrants the conclusion that respondent's interpretation was unreasonable. In June 1949 Sellens, the station's night watchman, and Engineer George reported to Click (R. 32, 181) that Announcer Clark had been in the station after the 11:00 p. m. closing hour, had attempted to turn on some of the equipment, and had been asked by Sellens to leave (R. 32; 131).

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<sup>14</sup> Prior to the hearing, in a letter addressed to a field examiner of the Board following the filing of the charge in this case, Barnett stated simply that "Click was released for incompetency and willful neglect of duty" (R. 25; 83-84).

Clark's action was contrary to a rule of the station forbidding its use after hours to anyone except Click, and, according to Click's credited testimony, the attempted use of equipment was contrary to F. C. C. regulations (R. 32; 181-182).<sup>15</sup> On the night of June 22 Click found Clark in the station after the closing hour and asked him to leave (R. 32-33; 106-107, 192-193). On the following day Barnett, having learned of the incident, inquired of Click why Clark was expelled from the station (R. 28, 33; 106-108, 181). Click reminded Barnett of the station rule which he had not understood to have been rescinded (R. 33; 106-108, 181). Barnett denied to Click the existence of any such rule<sup>16</sup> and instructed Click to permit Clark's access to the station at all times (R. 33; 107). At this point Click directed Barnett's attention to Click's responsibility for the station's equipment imposed upon him by F. C. C. regulations (R. 33; 181, 194-195; Tr. 148) and stated that he would "never be responsible for the technical equipment of this station as long as that policy [of permitting persons

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<sup>15</sup> Rules and Regulations, Federal Communications Commission; 47 Code of Federal Regulations; 3 F. R. 3155; 14 F. R. 1600:

"Sec. 13.63 *Operator's responsibility*. The licensed operator responsible for the maintenance of a transmitter may permit other persons to adjust a transmitter in his presence for the purpose of carrying out tests or making adjustments requiring specialized knowledge or skill, provided that he shall not be relieved thereby from responsibility for the proper operation of the equipment.

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"Sec. 13.65 *Damage to apparatus*. No licensed radio operator shall wilfully damage or cause or permit to be damaged, any radio apparatus or installation in any licensed radio station."

<sup>16</sup> Both Sellens and Click testified to the existence of such a rule. The Board in crediting this testimony, rejected Barnett's denial that the rule existed (R. 33).

in the station after hours] lasts" (R. 28; 187, 194). To equate Click's observance of responsibilities with a willful neglect of duty, as respondent would do, is contrary to all reason and understanding. The Board properly concluded, therefore, that Click was acting in advocacy of an existing rule and was seeking to absolve himself of FCC-imposed responsibility for any damage to the equipment that Barnett's new arrangement might cause, and that such action was unquestionably not a justifiable reason for a discharge two or more months thereafter.

Barnett further urged at the hearing, as a reason for Click's discharge, Click's use of company-supplied gasoline for personal and unauthorized purposes. That Barnett had never relied upon this incident until pressed for justification for the discharge is clear from his own testimony that after speaking to Click about the incident in June 1949, he "dismissed [Click] from the office at that time and let it go at that because, while actually I should have discharged him on the spot \* \* \* I still thought \* \* \* I'll think it over and see what kind of action I should take" (R. 27; 105-106). Click, admitting that he used the gasoline to compensate for previous business-incurred gasoline expense, testified that he considered the matter "dropped," thus verifying Barnett's intent "to let it go at that" (R. 27; 173). Respondent thus resurrected at the hearing a long-forgotten, and forgiven, misunderstanding to justify a discharge occurring months after the misunderstanding itself occurred.

Upon considering the shifting and inconsistent character of respondent's reasons for Click's discharge, together with their apparent lack of any real merit, the Board properly found that the reasons advanced were mere pretexts intended to conceal respondent's discriminatory motivation.<sup>17</sup>

Respondent's more general accusations against Click were likewise more distinguished by their shifting character than by their substance. Thus Click was told that he was "inefficient, uncooperative, incompetent, unqualified, and dishonest," and that he "was a trouble maker and caused dissension among the employees." He was not told, as was the Union and the FCC, that he had not maintained the equipment; nor was he told, as was the Board agent, that he was discharged for "willful neglect of duty." Nor were either the Union or the Board agent told of the general "faults" attributed to Click at the time of his discharge. Accordingly, the Board's evaluation of these reasons as "shifting" is equally as applicable here as it was to the specific incidents considered above. And the courts have long recognized that inconsistency in explaining the reason for a discharge is a factor on which to base an inference that the true reason for the discharge is being concealed. *N. L. R. B. v. Waterman Steamship Co.*, 309 U. S.

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<sup>17</sup> The long interval between the occurrences assigned by Barnett as his reasons for Click's discharge and the date of his discharge (R. 39) strongly suggests that "the difficulties in his case only became seriously insupportable to his employer when he became [active] in the Union." *Agwilines, Inc. v. N. L. R. B.*, 87 F. (2d) 146, 154 (C. A. 5).

206, 221, 223; *N. L. R. B. v. Yale & Towne Mfg. Co.*, 114 F. (2d) 376, 378 (C. A. 2).

The circumstances of Click's discharge and the palpably specious nature of the explanations offered by respondent thus furnish ample basis for the conclusion that the discharge was discriminatory. Click, a qualified technician, doing an admitted satisfactory job for the six weeks preceding his discharge (R. 118), was summarily dismissed for reasons given in only general terms and was given twenty minutes to leave the station, with a license hurriedly endorsed "unsatisfactory," for reasons that, when later divulged, were found to be shifting and contrary to fact. Following Click's discharge, George, who had less experience and seniority than the other engineers, but who was the only one who had not joined the Union and had voted against it in the Board election, was assigned the job of chief engineer, as Click's replacement. Such circumstances, particularly when linked with respondent's conceded knowledge of Click's prominence in the Union, its admitted questioning of Click and others respecting the Union, and its accompanying threats made from the very advent of the Union, fully support the Board's conclusion that Click's discharge immediately after the Union's successful campaign constitutes discrimination because of his union membership and activity in violation of Section 8 (a) (3) of the Act.

#### CONCLUSION

It is respectfully submitted that the Act is applicable to respondent, that the Board's findings are

supported by substantial evidence considered on the record as a whole, that its order is valid and proper, and that a decree should be entered enforcing said order in full.

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JANUARY 1952.

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended<sup>1</sup> (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, *et seq.*), are as follows:

### DEFINITIONS

#### SEC. 2. When used in this Act—

\* \* \* \* \*

(6) The term “commerce” means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term “affecting commerce” means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

\* \* \* \* \*

(11) The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in con-

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<sup>1</sup> The Act was further amended, in a manner not material here, by Public Law 189, 82d Cong., 1st Sess., enacted Oct. 22, 1951.

nection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

\* \* \* \* \*

#### RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

#### UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

\* \* \* \* \*

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or



the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

\* \* \* \* \*

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

\* \* \* \* \*

#### PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means

of adjustment or prevention that has been or may be established by agreement, law, or otherwise. \* \* \*

(c) \* \* \* If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act \* \* \*

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing,

modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. \* \* \*



No. 13041

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

STEVE CHORAK, *et al.*,

*Appellants,*

*vs.*

RKO RADIO PICTURES, INC., *et al.*,

*Appellees.*

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No. 13041

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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STEVE CHORAK, *et al.*,

*Appellants,*

*vs.*

RKO RADIO PICTURES, INC., *et al.*,

*Appellees.*

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## BRIEF OF RESPONDENTS.

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### Preliminary Statement.

In this case the District Court found as follows:

1. That appellant's theatre at Puente is in substantial competition with the Valley, El Monte and Tumbleweed Theatres (all in the El Monte area) and is not in substantial competition with any of the other theatres mentioned in the complaint. [F. F. IV, R. 140.]

2. That a grant of a reasonable clearance affords a fair protection to the interest of the licensee in the run granted without unreasonably interfering with the interest of the public, and is essential in the reasonable conduct of the business of distributing and exhibiting motion pictures. [F. F. VI, R. 143.]

3. That the availability established by each defendant distributing company for the Puente Theatre and the clearance granted by each distributor company to the

theatres in substantial competition with appellant's theatre was reasonable and was established by each distributor independently and without any contract, agreement, combination, conspiracy, or understanding, either express or implied. [F. F. VI, R. 147.]

4. That the general policy of defendant Sanborn in showing in his El Monte Theatre feature pictures distributed by the defendants Warner's, Loew's, Fox, Paramount and Universal and of defendant Edwards in exhibiting in his Tumbleweed and Valley Theatres the feature pictures of defendants Columbia, RKO, Monogram and Republic was not established as the result of any agreement, plan or conspiracy between themselves or with others. [F. F. VI, R. 149.]

5. That the exhibitor defendants do not have nor have they exercised any mass purchasing power in the rental of feature pictures exhibited in the area involved. [F. F. VI, R. 150, F. F. IX, R. 152.]

6. That none of the defendants has engaged in any combination or conspiracy to restrain or monopolize interstate trade or commerce in the distribution or exhibition of motion picture films within the area concerned in this action and that none of the defendants has, in fact, monopolized or restrained said trade or commerce. [F. F. VIII, R. 151.]

7. That none of the defendants has established or maintained in the competitive area an arbitrary, uniform or unreasonable system of runs or clearances; that appellant has not been improperly excluded from obtaining

motion picture films for exhibition; that none of the distributors has discriminated against the appellant, and that none of the distributor defendants has fixed the minimum admission prices which appellant has charged, but that such admission prices were fixed by appellant in his own uncontrolled discretion. [F. F. IX, R. 152-153.]

8. That appellant has not been damaged by the acts of defendants. [F. F. XI, R. 153.]

Under the rules controlling federal appellate courts the foregoing findings of fact are conclusive unless "clearly erroneous." (F. R. C. P. Rule 52; *United States v. Yellow Cab Co.* (1949), 338 U. S. 338, 342.)

In effect, it is the contention of appellant that *as a matter of law*, and upon the record, this court must find the facts to be, in each instance, the exact opposite from those found below, for only otherwise can the judgment be reversed. On the other hand, it is the contention of the respondents that each of said findings and the decision based thereon are fully supported by the evidence, and the reasonable inferences to be drawn from the evidence and that the most that can even be claimed in any instance is the existence of a conflict in the evidence, which, in this case, was resolved against the appellant in favor of the respondents. In short, the issues presented by this appeal are whether the evidence supports the basic conclusions of the trial court that there was no conspiracy and that the clearances granted were not unreasonable. A determination of those issues in favor of the respondents would appear to dispose of the matter.

### Statement of Facts.

The impression of this case which might be gathered from a reading of appellant's opening brief is so very different from the facts as developed in the record and found by the court as to make the case presented by him hardly recognizable as the one which was actually tried. Under the guise of stating facts, evidence or findings the appellant has utilized the devices of misstatement, omission, invective and argument to paint an entirely erroneous picture.\* We are, therefore, compelled to state the facts as shown by the record and found by the court in much greater detail than would otherwise be necessary.

The area of Los Angeles County generally known as the San Gabriel Valley is located adjacent to and just north and east of the City of Los Angeles. The Valley is approximately 10 miles in width and extends east from Pasadena, Alhambra and Monterey Park to the San Jose Hills a little west of Pomona. Two federal arterial highways cross the area from west to east. The northernmost of these is Foothill Boulevard (Federal Highway 66) which runs from Pasadena through Azusa to San Bernardino. The southernmost is Garvey Boulevard (Federal Highway 99) running from Los Angeles through Monterey Park to Pomona and thence through Riverside to Blythe and the Imperial Valley. Between

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\*See *e. g.*, the seven "facts" on pages 13 to 15 of the Brief, which appellant says "the above testimony clearly establishes without substantial dispute," and the eight more at pages 36 to 37 which he declares "the evidence shows and the court found."

The errors of fact in appellant's Brief are so numerous that they cannot be corrected within the body of our brief. We have listed the most salient ones in Appendix, Part A attached.



these two highways, Valley Boulevard runs easterly through the cities of Alhambra and El Monte. Just east of the city limits of El Monte it crosses Garvey and swings far to the south between the San Jose and Puente Hills and then north again to rejoin Garvey Boulevard just west of Pomona. A number of years ago Valley Boulevard was the main highway between Los Angeles and Pomona, but with the construction of Garvey as a new, direct, and short arterial route, Valley Boulevard, east of El Monte, has become a purely secondary road. [Exs. 1, A; R. T. 657, 748.]

The City of El Monte is located approximately in the center of the southern part of the San Gabriel Valley about 6 miles east of Alhambra. It is, as the court found, an important trading and business center for a large segment of the Valley including the community of Puente. [F. F. VI, R. T. 148.] While its incorporated limits are small, it and its environs (including the immediately adjacent intersection of Garvey and Valley Boulevards, known as "Five Points") lie at the eastern end of a highly congested area. In the area from El Monte west to Alhambra there were in October, 1948, approximately 180,000 people. [Ex. 2, Areas 12, 28.1 to 28.3, 28.6; see map on reverse side.] Many of the theatres named in the complaint or discussed in appellant's brief, such as the Rosemead, Garvey, Monterey Park and Temple City Theatres, lie in this congested area *west* of El Monte.

Almost immediately after Valley Boulevard leaves the Five Points intersection on its circuitous eastern route between the San Jose Hills on the north and the Puente Hills on the south the nature of the area changes. It becomes almost entirely rural with scattered farms and dwellings. [R. T. 748, 1621.] The evidence shows that in the so-

called "Puente Hills" area, as defined by the Regional Planning Commission of the County of Los Angeles and which extends from the Five Points intersection almost to the City of Pomona, a distance of approximately 15 miles and about one-half of that distance north and south, there were only 15,954 inhabitants at the time of the trial. [Ex. 2.] In fact the map on Exhibit 2 shows that although the so-called "Puente Hills" area is one of the largest, if not the largest, of the 35 Regional Planning Commission areas in the County of Los Angeles, it has less inhabitants than any other such area except the five isolated areas of Catalina Island, Calabasas, Malibu, Chatsworth and the mountain terrain north of Santa Monica.

The little rural community of Puente is located on Valley Boulevard approximately five miles southeast of the Five Points intersection. It is an unincorporated settlement in which, as the court found and appellant conceded [F. F. VI, R. 148; R. T. 10, 34] approximately 43% of the residents within a one-mile radius are Spanish speaking. The entire population within such radius consists only of 2,190 [Ex. A] as compared with a population within the same radius of the Five Points intersection of 12,804 [Ex. A], a population within the corporate limits of the City of El Monte of 7,702, and a population in the Planning Commission "El Monte Area" of 61,348 [Exs. A and 2]. El Monte is a city with a completely urban character; Puente is a small rural town with no elaborate business section or substantial business construction. [R. T. 466, 619; Or. Op. 12-13.] In fact, as the court observed in its oral opinion, the appellant's theatre "is now the principal building of the community." [Or. Op. 12.] When it is noted that this building only

cost \$75,000 [Ex. AA] the character of the community becomes fairly obvious.

Each of the distributors follows the same general pattern in the distribution of its pictures in the San Gabriel Valley area. Each distributor seeks and usually secures a first run for its pictures in one or more of the deluxe theatres in Los Angeles with its usual accompaniment of advertising and publicity. Seven days from the close of exhibition in Los Angeles each particular picture is usually exhibited in one or more of the theatres in Pasadena simultaneously with its exhibition in other similar suburban communities such as Glendale, Inglewood and Huntington Park. Following the normal method of distribution, which provides for succession in exhibition from the larger area to the smaller, most of the distributors seek exhibition in theatres in Alhambra 7 days after the picture closes in Pasadena. [R. T. 1401, *et seq.*, 1451-55; Ex. PP.] The theatres between El Monte and Alhambra generally receive availabilities from each distributor based upon the close of the picture in Alhambra. The three theatres in the El Monte-Five Points area have an availability of 14 days after Pasadena closing, which availability is ordinarily behind Alhambra but ahead of the theatres "keying off" of Alhambra. [Ex. Z.]

The respondent Sanborn was the pioneer exhibitor in El Monte, having commenced his career as an exhibitor there in 1922. He first owned what is now the Valley Theatre and about 1939 built the El Monte Theatre which the evidence showed and the court found to be the largest and finest of the four theatres directly concerned in this litigation. [R. T. 109; Or. Op. 13; F. F. VI, R. 148.] Approximately at the same time respondent Edwards entered the El Monte area by the erection of the Tumble-

weed Theatre at the Five Points intersection. [R. T. 66.] This theatre with a seating capacity of 737 is also a fine modern theatre.\* About a year later Edwards was able to induce the landlord of the Valley Theatre to give him the lease on that house instead of Sanborn [R. T. 66, 738] and since that date has been operating both the Tumbleweed and Valley Theatres in the El Monte area.

During the period when Sanborn operated both the El Monte and Valley Theatres, he operated each theatre on a "first run El Monte" basis, utilizing the product of all of the distributors named excepting RKO, Republic and Monogram. [R. T. 738, 750, 1771-75.] When the Tumbleweed Theatre opened, Edwards demanded the right to play such pictures on an availability of 7 days following their exhibition in Sanborn's theatres, and when such right was refused, brought an arbitration proceeding under the provisions of the consent decree theretofore entered in 1940 in the case of *United States v. Paramount Pictures, Inc.* In that proceeding to which Edwards, Sanborn and the major distributors were parties and which was binding upon them under the terms of that decree, it was held that Sanborn's El Monte Theatre was entitled

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\*It is most important to note that the Tumbleweed, while located just outside the incorporated city limits, is for all intents and purposes an "El Monte theatre" [R. T. 107-8] and was so treated at the trial. [R. T. 76, 107-9, 303, 369, 759-60, 796, 1783.] As the court said: "It is part of El Monte. The Tumbleweed Theatre is right at the edge of town. It might be outside the city limits if you want to draw an imaginary line there, but it is all a part of that community." [R. T. 796; Or. Op. 12.] It is so treated in the findings. [F. F. IV, R. 140; VI, R. 148, 149, 150.]

Appellant's Brief practically ignores the larger, newer, more modern, and closer Tumbleweed, and directs attention only to the little Valley Theatre. (App. Br. 10, 11, 12, 17, 18, 21, 22, 27, 28, 29, 33, 34, 36, 64.) It is thus most misleading.

to a clearance of 28 days over the Tumbleweed on pictures purchased by Sanborn. [R. T. 751, 1175-78, 1706; Arb. Bd. Appeals Dec. No. 55.] As a result Edwards was faced with either playing 28 days behind Sanborn or playing "first run El Monte" upon such pictures as he could secure on that basis. He chose the latter course. [R. T. 1706.] Since Sanborn's theatre was the larger and finer theatre and could hence afford to pay the most money for the pictures, Sanborn was able to retain the choice product of the larger companies of Loew's, Paramount, Fox, Warner Bros., and in addition Universal and United Artists. Edwards, on the other hand, was able to secure on an equal availability only the pictures distributed by RKO among the major companies, and the minor and weaker product of Columbia, Republic, Monogram and a number of independent companies not parties to this litigation. [R. T. 83, 108, 750, 1771-75.] When he acquired the small Valley Theatre, Edwards followed the policy generally of playing the pictures of those companies in both the Valley and Tumbleweed, the practice usually being that the picture played first in the Tumbleweed and thereafter and within a few days or a week at the most in the Valley. [R. T. 75-76; Exs. N, O. P. HH.]

In 1947 appellant, who had some experience as the operator of theatres in small communities, plus approximately 18 months as the operator of a subsequent run house in Oakland [R. T. 842-46], commenced the erection of a theatre in Puente, which village had not theretofore had any theatre. He erected a substantial and surprisingly large house with approximately 726 seats. On November 21, 1947, by registered letter he advised the vari-

ous distributors of the construction of his theatre, declaring:

"The new Puente Theatre's relation toward other theatres in the territory will be *strictly non-competitive, because this community is composed mostly of Mexican nationals, and local farmers*,\* who for years clamored for their own theatre in this community.

"As my intended policy is to show your pictures *immediately after Los Angeles first runs*, kindly mail me now your list of availabilities." [Ex. 115; R. T. 878, 1071.]

He followed up this letter with personal visits upon the various distributors seeking the playing position mentioned. [R. T. 879-934.]

Shortly thereafter both Edwards and Sanborn, apparently learning of Chorak's letter, wrote the distributors, each requesting clearance over the Puente Theatre. Sanborn, after pointing out his history in the El Monte area and the status of El Monte as the business center for the district including the Puente community, declared

"We believe this house [Puente] to be competitive to the El Monte theatre and in consideration of film revenue derived from El Monte, together with other contributing factors, feel this ample justification for the El Monte Theatre receiving clearance over Puente." [Exs. 113, 151.]

This letter was written to those distributors licensing him in El Monte.

Edwards requested a specific clearance in favor of his "El Monte situation" of 21 days, stating:

"In consideration of all matters concerned, such as competitiveness; distance; open country and wide,

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\*Italics added throughout unless otherwise noted.

paved, direct highways; respective size of the two towns, et cetera, we feel that we are more than fair toward Puente in asking for but twenty-one days' clearance." [Ex. 3.]

This letter was addressed to those companies which licensed their pictures to him in the Tumbleweed and Valley. Edwards also wrote those companies serving his theatre in Azusa in the northern part of the San Gabriel Valley (which included all of the major companies) asking that such theatre be given 21 days clearance over Puente. [Exs. 4, 114, 130.]

Each distributor was thus faced on the one hand with a demand from Chorak that he be permitted to play immediately following Los Angeles closing and ahead of every theatre in the San Gabriel Valley, including even the theatres in Pasadena and Alhambra, and on the other hand with the demands from Sanborn in El Monte and Edwards in both the El Monte area and Azusa for clearance over Puente. Each distributor individually and without consulting any other distributor made its own investigation of the situation so presented. [R. T. 176, 275, 397, 474, 1416, 1584, 1607, 1756, 1809, 1824, 1834; F. F. VI, R. 147.] This investigation included on the part of some of the distributors (*e. g.*, Loew's, Paramount, Fox) personal field examinations of the area and theatres by top local and divisional executives. [R. T. 443, 527, 548, 673, 1606, 1617, 1812, 1821.] In other instances such investigations were made by salesmen. [R. T. 212, 268, 351, 619.] Each distributor individually concluded (as did the court itself) that under all the physical conditions then existing, and applying the legal criteria set forth in the then decision of the Expediting Court in *United States v. Paramount Pictures, Inc.*, 66

Fed. Supp. 323, 341-343 (which had been rendered more than a year prior thereto), the Puente Theatre was in direct and substantial competition with the theatres in the El Monte area\* and that the latter were entitled to priority of run and clearance over Puente. [R. T. 268, 352, 409, 466, 527-28, 549-50, 1414-16, 1491-94, 1608, 1822.]

The clearances and availabilities determined upon by the different distributors were varied.\*\* [Ex. Z.] Warner Bros. established an availability for Puente of 21 days after Pasadena closing; Loew's, Universal, Republic and RKO gave 14 days after the conclusion of the exhibition of their respective pictures in the El Monte area. United Artists and Monogram gave 14 days after El Monte or 35 days after Pasadena whichever was the earlier. Paramount originally established an availability of 14 days after El Monte [R. T. 442-45, 466, 482] but within a month, and in view of an exceptionally fine showing by Puente on the picture "Roar to Rio,"\*\*\* re-

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\*Appellant conceded that in spite of his letter of November 21, 1947, he was in substantial competition with the El Monte area theatres. [Compl. R. 14, 23 *et seq.*; R. T. 1036, 1156.]

\*\*There is a technical difference between the word "availability" and the word "clearance." The word "availability" means the earliest date on which a picture may be exhibited in a particular theatre and is usually specified as a certain number of days after some other theatre or area. "Clearance" is the period established by agreement between a distributor and a prior exhibitor as the time which must elapse after the conclusion of exhibition before the picture may be played in another specific theatre or area. Thus the El Monte Theatre had an "availability" of 14 days after Pasadena and the Pasadena exhibitor who played a particular picture ordinarily had a contractual "clearance" of 14 days over El Monte.

\*\*\*This picture, which played within a month of the theatre's opening, grossed more in Puente than all except two of the English language pictures which played in that theatre during the entire period up to the time of trial, including a number of pictures which Puente played *ahead* of the El Monte area theatres. [See Appendix, Part C.]



duced its clearance to 7 days after El Monte. [R. T. 438-41.]

The Fox district manager determined from his investigation that the proper availability should be 14 days after El Monte, but agreed to establish an experimental availability of 7 days. [R. T. 1606, 1610.] On the first picture played, "Daisy Kenyon," Puente grossed only \$247.90 and returned to the film company only \$61.97 as rental. [Ex. X.] The second picture, "Captain From Castile," grossed slightly over \$300 in Puente and returned film rental of \$129.91, as compared with a gross of \$1,092 in El Monte and a film rental of \$454.40. [Ex. X.] After this experience with Puente's potential, Fox lengthened its availability from 7 days to 14 days after El Monte. [R. T. 1613.] The Columbia executive originally determined that an availability of 21 days after El Monte would be reasonable. Chorak, however, refused to buy pictures from that company on that availability, and Columbia was forced in order to meet competition to shorten the availability to 14 days after the El Monte theatres. [R. T. 269-70, 295-96.]

The evidence was uncontradicted that each distributor established its availability and clearance independently in the exercise of its own business judgment and without agreement or consultation with any other, and without knowledge of the actions of other distributors except as might come from appellant's own statement. [See Record references above.] The court so found. [F. F. VI, R. 147.] With respect to admission prices appellant testified

that he established them after an investigation of what other theatres were charging in the area [R. T. 1248] and that no distributor ever told him what he could or should charge. [R. T. 1247, 1306, 1309, 1311, 1314, 1315.] The price so established was the same as that charged by the Tumbleweed and the Valley but approximately 10¢ less than that charged by the El Monte Theatre. [Ex. Z.]

Appellant commenced operation of his theatre on February 20, 1948. His general policy of operation, after a few weeks of preliminary experimentation, was established at four changes a week, each with a double bill. He reserved Tuesdays for an all-Spanish program with pictures procured from the two Spanish companies which were originally made parties to the litigation and then dismissed. On Saturday he exhibited "action" or "Western" pictures, coupled with a "give away," obtaining the pictures usually from Columbia, Republic or Monogram. On his Sunday-Monday and Wednesday-Thursday-Friday changes he generally exhibited pictures of the major distributors as first on the double bill and those of Columbia, Republic and Monogram as the "fillers." [R. T. 1253-56, 1221; Ex. DD.] He thus purchased substantially all of the important pictures of the major distributors and such of the product of the other distributors as he desired for his Saturday programs and as secondary fill-ins. The evidence showed that up to March 31, 1949, he had made a profit of \$7,000 after paying approximately \$4,000 in interest on loans for his building and equipment and deducting approximately \$7,000 for depreciation

and amortization. [Ex. BB.] He admitted, and the evidence showed, that he was enjoying an increasing income [R. T. 1042; Ex. BB], although generally the box office in the area was in a slump. [R. T. 765, 766, 1768.]

The foregoing presents the basic facts appearing in the record and upon which the court made its finding that there was no conspiracy and no violation of the anti-trust laws. They are without substantial contradiction in the record. During the course of this brief we shall have occasion to comment further upon particular evidentiary matters upon which appellant relies to overcome the effect of those facts.

At the close of the evidence the court requested briefs. Two very voluminous briefs were filed by each side analyzing the evidence, presenting computations and arguing legal matters, followed by written answers to specific questions propounded by the court. On October 20, 1949, the court gave its oral opinion, determining that respondents should have judgment, and giving reasons therefore. The findings were not finally settled until May 15, 1950. [R. 132.] On May 24, 1950, appellant moved for a new trial [R. 160] which motion was argued and briefed in detail. Before it could be determined, appellant moved on November 14, 1950, to supplement his motion. [R. 174.] The supplemental motion was again fully briefed, and both motions denied on February 21, 1950. [R. 190.] The trial court thus had before it a full and complete discussion of the evidence and the arguments presented on this appeal.

### The Economics of the Industry Involved.\*

Since this case involves an industry with peculiar economic problems dictating an unusual method of "selling" its product, the evidence has to be viewed in the light of those problems. Before discussing the specific points involved in the appeal, therefore, we desire to call attention to the background against which the evidence must be evaluated.

The ordinary first-rate feature motion picture will have a negative cost of from \$750,000 to \$4,000,000, to which must be added the cost of prints, advertising and distribution.\*\* There are about 17,000 theatres in the United States, of which a major distributor may hope to service from 12,000 to 14,000 on a top picture. [R. T. 1396.] Assuming 12,000 are licensed to exhibit a picture with a \$2,000,000 negative cost, the average return per theatre must be approximately \$285 in order for the picture to break even.\*\*\* These theatres are of all sizes and in all locations. They charge admission prices ranging from 10¢ to 15¢ to several dollars per ticket. They cater to differing economic and social masses of patrons. Most of them, as the evidence shows [R. T. 1440] do not

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\*The material in this section was the subject of testimony by various distributor executives, especially that of Mr. Smith, the Paramount division manager. [R. T. 1393-1413, 1417-22, 1430, 1439-49, 1453-56, 1491-96, 1507-12.] See also testimony of Mr. Stoner, district sales manager for Fox. [R. T. 1600-59, esp. 1628, *et seq.*]

\*\*Advertising and distribution is estimated at about 70% of negative cost

\*\*\*This is without regard to cost of printing from the negative, which for a black and white picture, is from \$200 up per print, and for a color picture is from \$600 up per print. [R. T. 1439.]

and cannot pay anywhere near the average amount necessary to bring back costs, much less make any profit.

These indisputable economic facts, unique to this industry, make essential the system of successive exhibitions or "runs" and as a corollary the existence of the lapse of time between "runs" in an area of competition, or "clearance." This system is not only for the benefit of the distributors but equally, if not more so, for the benefit of the exhibitors. It is of benefit to the public as well because it permits every person to see the picture at such theatre and such price as suits his convenience and pocket-book.

We do not believe that we need to do more than sketch the essentiality of this method of distribution as far as the distributor is concerned. Where a print alone costs a minimum of \$200 and has a life of 50 or 60 "runs," it would be impossibly extravagant to make 12,000 prints, each to be used once and thrown away.\* Furthermore, the distributor's object is to have as many people as possible see each particular picture distributed by him. His ideal would be to have his picture seen by every person of motion picture age in the United States. To come anywhere near such ideal the picture must have an extended exhibition life. If every exhibitor showed the picture at approximately the same time, its life would be, at the most, a week or two, and great numbers of patrons would be lost because it might not be convenient for them to see the picture during the particular period. The distributors would also lose the benefit of the advertising build-ups, including word-of-mouth advertising, which is

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\*Actually, a distributor makes from 200 to 300 positive prints per picture. [R. T. 1439.]

important in the case of every successful picture. [R. T. 1439-42.]

Even more important, however, is the fact that the distributor cannot secure the same amount for the exhibition of the picture from each of the 12,000 theatres he might serve because most of them simply cannot afford to pay their average share of those costs.\* Therefore, he must charge some theatres substantially *more* than such average for the same picture which he delivers to other theatres at substantially *less*. In order to get many times more from one customer for the same identical picture than he can secure from another and competing exhibitor, the distributor obviously has to offer something in return. This fact makes the system of successive “runs” and “clearances” of vital importance to the exhibitor.

For it must be remembered that just as the distributor has nothing tangible to sell, neither has the exhibitor. Here is a business in which the customer invariably comes out of the establishment, not with something he can see or touch or show, but with less by the amount of admission price than he had when he went in. He receives only entertainment—mental and emotional stimulation to a greater or less degree. That stimulation is not greatly affected by *where* or *when* he sees the picture. He hears and sees exactly the same thing whether it be in the most expensive, deluxe metropolitan theatre or the cheapest “grind house” or tiny rural hall.

The element which the distributor has to offer and each exhibitor strives to acquire is an advantage in the

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\*It was testified that approximately half the accounts sold pay less than \$50 for the license of the very top pictures. [R. T. 1440.]

*timeliness* of the exhibition—the appeal to the curiosity and the pride of the movie fan. Such curiosity is aroused by previous pictures made by the same studio, the type of picture in question, the “star” system, the barrage of publicity, exploitation and advertising, the movie columns and fan magazines and radio movie gossipers. The movie goer wants to see the picture first and then to talk about it to others. To the varying degrees in which these emotions are aroused in particular individuals and on particular pictures, there is an equivalent variation in the number of times the patron will attend, the distance he will travel and the price he will pay.

That is why some exhibitors will always pay more for the right to exhibit identically the same picture in a particular area than will other exhibitors. They buy the right to exhibit *first*, ahead of their competitors and the right to have sufficient time lapse before the competitor exhibits so as to capitalize on the curiosity and pride of the patrons. The right to *show* the picture is open to everyone. There is no claim here that Mr. Chorak was denied a license for any particular picture. But what the distributors are really selling and what the exhibitors are really buying is a particular position in the sequence of exhibitions in a competitive area—the “run”—with an adequate “clearance” period to guarantee that what has been bought and paid for will not be dissipated. As the witness Taylor put it clearly, “The only thing we have to sell in this business is clearance.” [R. 513.] Mr. Taylor exaggerated, but he pointed up an essential truth.

Since therefore *the competition between the exhibitors with respect to any picture is not for the picture itself*, which each can and does get if he wants it, *but for the right to give the earlier exhibition of it*—a prior run with

reasonable clearance—the exhibitor whose position gives him the greatest potentiality of box office earnings and who is willing to offer license fees, based upon such potentiality, which under all circumstances will return the most revenue from the area will generally be able to buy such right over his competitors.\*

There are various elements which in the aggregate determine the theatre with the highest grossing potentialities. Seating capacity is important, of course. Other things being equal, the larger the house the larger the grosses. This does not mean, however, that a 3,000-seat house in the middle of the desert would be able to compete for a prior run successfully against a much smaller theatre in a congested area. Locality with respect to communities is very important. There is a perfectly natural

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\*In his studied and determined refusal to recognize this basic fact lies the fundamental fallacy of appellant's entire position. He considers "competition" as being solely that of exhibitors *for the patronage of the public*. Hence, he contends that his failure to secure the run he desires makes him "non-competitive" as to the exhibitors in the El Monte area. But, as far as the distributor is concerned, the competition *for the run* is the thing with which it is involved. Once *that* competition has been determined in favor of one or another exhibitor, and the run granted, then the position of the two exhibitors between each other for patronage has been fixed *as the result of the competition for the run*. Judge Hand pointed this out clearly in the very recent case of *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.* (2nd Cir. 1951), 190 F. 2d 951, 958:

"In considering evidence of a conspiracy it should be kept in mind that there are a limited number of pictures available for exhibition so that *what one exhibitor gets for a given run is necessarily not available to his competitor*. A distributor is, therefore, by the very act of distributing pictures, *favoring some exhibitors at the expense of others*. At best an inference of conspiracy would only arise if it appeared more to the interest of the distributors involved to adopt a different pattern of distribution than the one actually employed. *Thus there is nothing illegal in the mere fact that Dipson could not get all the pictures it wanted for the runs it wanted.*"



and well-established tendency when people are going out for an evening's entertainment to go from the village to the town and from the town to the city. [R. T. 1493.] That tendency is of great advantage to the theatre in a larger city and increases its grossing potentialities. The same is true with respect to a more or less desirable location within the community itself. The type of theatre, its accommodations, and the services it renders have their effect, as does the "policy." The extent of appeal of the type of pictures which are generally shown in view of the type of patronage, or the way in which the exhibition program changes, or the number of pictures exhibited on a program may affect grosses. Admission price is important also. The extent to which the management is economical and efficient is an important factor.

These are ordinary elements which determine competitive advantages in *any* business and which are established and controlled by the respective exhibitors, not by the distributors. If upon a fair weighing of these elements it is clear that one exhibitor has a greater grossing potentiality and can thus afford to and will pay more than his competitor for the run and for a lapse of a reasonable time before the picture can be shown elsewhere, then he is entitled by our system of free enterprise to buy that priority and clearance, and he is also entitled, in the interest of fair competition, to get what he pays for.

It is equally vital to the distributor's interests to see that the area or theatres with the greatest grossing potentialities receive the fullest advantage of timeliness. This is true for obvious reasons where the admission prices are larger since rentals are quite generally calculated on a percentage of the gross, but it is equally true where the advantages in grossing potentiality depend upon other

factors. Unless such advantages are fortified by a commensurate earlier exhibition of the picture, the loss of timeliness will result in many patrons passing up the picture entirely, to the destruction of the potentiality itself. If the distributor is to conduct its business at a profit it must, therefore, assure itself that the areas and theatres having the greatest grossing potentialities secure the earliest runs, and a fair protection through a reasonable clearance period to the run so licensed, thus capitalizing on such potentialities and assuring the return to the distributor of the maximum revenue from the picture.

It is these economic principles which determine the method of distribution of motion pictures. Their existence, and the consequent establishment of successive runs based generally upon priority in a given area to localities and theatres having the greatest grossing potentialities with adequate clearance to protect the runs so granted, have been recognized and approved by every court without exception which has passed upon the question.

The findings of the Expediting Court in *United States v. Paramount Pictures, Inc.* (70 Fed. Supp. 53), were incorporated without substantial change as its findings in the final decree entered after remand from the Supreme Court. We quote:

"74. The cost of each black and white print is from \$150 to \$300, and of a technicolor print is from \$600 to \$800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with a reasonable protection for the earlier runs is adopted in the way of clearance.

“75. Without regard to period of clearance, licensing features for exhibition on different successive dates is essential in the distribution of feature motion pictures.

“76. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later exhibiting theatre at lower than prior rates.

First of all, it is a well known fact that the  
first of the main principles of the  
extended... for or during the effort, a  
protection of the interests of the license  
to run granted. It was undoubtedly inter-  
est with the interest of the public.  
ed. Su p. 1, 7.

“78. Clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures. The practice is of proved utility in the motion picture industry and necessary for the reasonable conduct of the business.” (70 Fed. Supp. 53, 62.)

These findings are based upon, and, in fact, taken almost word for word from an extended discussion of the subject contained in the Expediting Court's opinion in *United States v. Paramount Pictures, Inc.*, 66 Fed. Supp. 323, 341, to which we call particular attention. In that opinion the court also outlined the factors which distributors should properly take into consideration in appraising the grossing potential of a theatre. It said (pp. 343, 345):

"In determining whether any clearance complained of is unreasonable, the following factors should be

\*As modified in final decree. See 85 Fed. Supp. 897.

taken into consideration and accorded the importance and weight to which each is entitled, regardless of the order in which they are listed:

“(1) The admission prices, as set by the exhibitors, of the theatres involved;

“(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

“(3) The policy of operation of the theatres involved, such as the showing of double features;

“(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

“(5) The extent to which the theatres involved compete with each other for patronage;

“(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

“(7) There should be no clearance between theatres not in substantial competition.

\* \* \* \* \*

“Much that has been said about clearance is applicable also to runs; the two are practically alike. Clearances are given to protect a particular run against a subsequent run, and the practice of clearance is so closely allied with that of run as to make comment on the one applicable to the other.”

The position of the Expediting Court in the *Paramount* case on the validity of the method of distribution by successive runs and adequate clearance was approved by the Supreme Court in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 145 (1948), and in *Schine Theatres v. U. S.*, 334 U. S. 110, 121 (1948).

In its opinion the Expediting Court pointed out that:

“Several courts have previously considered the validity of clearances under the Sherman Act and have concluded that in the absence of an unconscionably long time or too extensive an area embraced by the clearance, or a conspiracy of distributors to fix clearances, there was nothing of itself illegal in their use. *Westway Theatre, Inc. v. Twentieth Century-Fox Film Corp.*, D. C. Md., 30 F. Supp. 830, affirmed on opinion below, 4 Cir., 113 F. 2d 932, and unreported cases therein cited; *Gary Theatre Co. v. Columbia Pictures Corp.*, 7 Cir., 120 F. 2d 891. We find the reasoning of these cases persuasive.” (66 Fed. Supp. 323, 342.)

The *Westway* case referred to by the court presented a factual situation uncannily similar to that presented by this appeal. It was a treble damage suit in which plaintiff was the owner of a new theatre in a suburban community just outside the City of Baltimore. Defendant, operator of an independent circuit of 32 theatres, one of which was located within the Baltimore city limits and about two miles from plaintiff's theatre, asked for and secured a clearance of 14 days over plaintiff from the distributors who served defendant and which included all of the major distributors, excepting RKO. The court held that there was no conspiracy among the distributors and that their actions were reasonable. In a splendid opinion, so complete and convincing that the Court of Appeals affirmed solely upon its authority (4 Cir., 113 F. 2d 932), the court carefully outlined the reasons for the system of runs and clearances, and then said:

“First and subsequent runs of motion pictures is a practical physical necessity of the business. . . . Therefore such a provision in the contract [for clear-

ance] is entirely consistent with the ordinary rights of ownership of property, and would seem to be entirely legal unless by combination or conspiracy or by harsh and oppressive treatment prejudicial to the public and particular individuals, the ownership of the copyright is made merely an instrumentality for the unreasonable restraint of trade or competition.” (30 Fed. Supp. 834, 835.)

The *Westway* case has been cited many times and always with approval.\*

In *Gary Theatre Co. v. Columbia Pictures Corporation* (7th Cir., 1941), 120 F. 2d 891, the upper court affirmed a judgment for defendants in a Sherman Act case upon the findings below. These findings included the following:

“ . . . that the copyrighted films are commonly licensed, subject to the established rules of clearance and priority, for successive runs; that, in general, license fees paid to distributors for prior runs produce greater revenue than subsequent runs in the same area; that the distributor attempts to license each successive run to such theatre as by reason of size, location, equipment, prestige, price, management and business policies is in position to earn and pay the highest fees; that the existing practices are usual, customary and necessary for economically sound distribution and exhibition of films and beneficial both to distributor and exhibitor;” (Pp. 893, 894.)

Since the opinions in *United States v. Paramount Pictures, Inc.* (66 Fed. Supp. 323, 334 U. S. 131), various Courts of Appeal have had before them cases where the plaintiffs' positions were almost identical with that of the

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\*See citations listed in *Windsor Theatre Co. v. Walbrook Amusement Co.* (D. C. Md. 1950), 94 Fed. Supp. 388, 395, note 2.

appellant here and where the principles above annunciated formed the basis of judgment in favor of the defendants.

In *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.* (2 Cir., July 15, 1951), 190 F. 2d 951, the plaintiff exhibitor alleged a conspiracy among the major distributors who granted priority of run and clearance to a competitor. In the course of its opinion upholding the findings of the District Court that no conspiracy existed Judge Augustus Hand (who wrote the opinion in *U. S. v. Paramount*) said:

“In considering evidence of a conspiracy it should be kept in mind that there are a limited number of pictures available for exhibition so that what one exhibitor gets for a given run is necessarily not available to his competitor. A distributor is, therefore, by the very act of distributing pictures, favoring some exhibitors at the expense of others.” (P. 958.)

The court cited the *Westway* case as “well summarizing the process.”

In *Windsor Theatre Co. v. Walbrook Amusement Co.* (D. C. Md., 1950), 94 Fed. Supp. 388, affirmed 4th Cir. (1951), 189 F. 2d 787, plaintiff had built a new theatre in a neighborhood area of the City of Baltimore. Defendant, the owner of two theatres in the area, after unsuccessfully trying to prevent plaintiff's theatre from being built, applied for and received priority of run and clearance over the defendant from the six distributors who were sued. The District Court found that no conspiracy existed and that the actions of the defendants were reasonable under the basic economic principles above outlined. Such findings were affirmed on appeal. Both courts, in excellent opinions directly in point here, cited, discussed and relied upon the *Westway* case.

The most recent decision of which we are aware involving a treble damage suit in the motion picture industry is that of Judge Leon Yankwich in the Southern District of California, filed August 17, 1951, in the case of *Fanchon & Marco v. Paramount Pictures, Inc., et al.* (C. C. H. Tr. Reg. Rep., page 64,753.) In that case the plaintiffs were the operators of a theatre within the urban section of the City of Los Angeles. They alleged that all of the defendant distributors had joined in a conspiracy to deny them first-run privileges in the City of Los Angeles and to subject them to a clearance of 21 days in favor of first-run theatres, which clearance permitted other theatres in other communities and districts within the metropolitan area to play pictures ahead of their theatre. In a long and well considered opinion Judge Yankwich ordered judgment for the defendants. Among other excellencies the opinion contains a clear and distinct approval of the method of distribution here discussed. Judge Yankwich said:

“The nature of the product with which motion picture distributors and exhibitors deal is such as to require the regulation of the manner of exhibition. It would be conomically unwise, even if feasible, to throw the product on the market on the same day in all the thousands of theatres in the United States, or even in a theatre-going area like Los Angeles. The average minimum number of prints for a feature picture is 280, the maximum is 400. These must serve 15,000 accounts. For the Los Angeles area, 12 prints are reserved, which number, after the 21-day play-off, is increased to 30. The minimum cost of a print is \$165.00.

“So preference must be given to certain theatres. And to make such preference effective, the exhibition of pictures at other theatres must be limited to a



lapsed period after exhibition of the picture at first-run theatres. Because motion pictures play in units of weeks, the availability period is described in multiples of seven, there being seven, fourteen and twenty-one day periods after first runs elsewhere.

"This pattern obtains not only as between different localities, but in theatres located in the same community. And, generally, the rule in the industry has been to license motion pictures upon this basis. No cases exist which hold that the system, *in itself*, is a violation of anti-trust laws. To the contrary, all the decisions which have come from the higher courts postulate the legality of these restrictions, condemning only unreasonableness in the preferences."\* (Citing cases.)

As far as the case at bar is concerned the record clearly shows and the findings of the court clearly establish that all that was done by each distributor, acting individually and independently, was to apply to the factual situation which existed with reference to appellant's theatre and its substantial competitors the economic principles which are above outlined and which have been held not only legal, but essential in the distribution of motion pictures. The lower court found that such application was not the result of any "conspiracy" and was wholly reasonable, just as the courts found in the *Westway*, *Gary*, *Dipson*, *Walbrook* and *Fanchon & Marco* cases and in other cases which will be hereafter referred to. Appellant's attack here in its essence is an attack upon the laws of economics. His claim of conspiracy is based upon the simple fact that the distributors were uniform in their refusal to violate those laws.

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\*Italics the court's.

## ARGUMENT.

### I.

**The Finding That There Was No Conspiracy to Restrain Trade or Commerce in Violation of the Anti-Trust Act Is Fully Supported by the Evidence.**

In his opinion in *Fanchon & Marco v. Paramount Pictures, Inc., supra*, Judge Yankwich said:

“We start with the postulate that an exhibitor does not have the right to *compel* a motion-picture producer to give him a preferred run. Of necessity, as the motion picture industry could not operate under a system of simultaneous releases, clearances and runs are not illegal *per se*. And the criteria to follow were those adopted by the Supreme Court in the Paramount and Schine cases. They require us to determine, in each *instance*, whether a particular run is unreasonable.” (C. C. H. Tr. Reg. Rep., page 64,758.)

“So he who claims to have been injured by such preference must show (a) that the preference was the result of concert of action between the defendants, (b) that it was unreasonable and not based upon the various factors which courts have considered as reasonable considerations entering into the determination,—such as admission price, location of a theatre, its policy with regard to the showing of double features, gift night and other exploitation methods, the rental terms, the extent to which comparative theatres compete with each other,—and (c) that he has been damaged by such action.

“As to the manner of proof, the Courts have adopted a liberal attitude, and have permitted in-

ferences of *joint* action to be drawn from *parallel* action.

“But, regardless of burden of proof, in the last analysis, the trier of facts must be satisfied that the practices which the plaintiff claims to have injured him were the result of joint action.” (Page 64,758.)

“In determining the matter after a complete trial, the question of the burden of proof and of inferences from similar action becomes academic.

“In order to allow recovery, we must be satisfied from the record that the restrictions which the defendants have imposed on the plaintiff are the result of a concert of action, and are unreasonable. Inference from similarity loses its importance when met by positive denials of such action. More, in the realm of commerce, similarity of action, at times, may be the result not of previous agreement, but of solving an identical situation in a similar manner. The facts must be assayed in the light of these principles.” (Page 64,759.)\*

We know of no better statement of the correct approach to a case of this type.

**A. The Evidence Affirmatively Showed Lack of Joint Action, Agreement or Understanding Among the Respondents.**

The evidence in this case establishes affirmatively the fact, as found by the court, that in the establishment of the playing position for Puente and of the clearance to which it was subjected each respondent distributor acted “independently and without any contract, agreement, com-

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\*Italics the court's.

bination, conspiracy or understanding either express or implied with any other distributor defendant" or with the exhibitors. [F. F. VI, R. 147.] The official of each respondent distributor responsible for the establishment of such playing position and clearance testified unequivocally that such establishment was a matter of his own independent business judgment based upon his own independent consideration of the factors involved and was made without conference, consultation or advice with any other distributor. [R. T. 176, 275, 397, 474, 1416, 1536, 1584, 1607, 1756, 1809, 1824, 1834.] Furthermore, there was affirmative and detailed evidence of the personal investigations and field trips and of the independent accumulation of factual data upon which the particular distributor based its judgment. The branch managers of Paramount, Loew's, Fox and Republic each testified to personal investigation of the area and theatres in question. [R. T. 443, 527, 548, 673, 1812.] In the case of Loew's and again of Fox, the sales managers and district sales managers, respectively, also made personal tours of the area. [R. T. 1606, 1617, 1821.] Other companies accumulated data through personal investigations by salesmen and others. [R. T. 262, 268, 351, 619.] Documentary evidence showing the individual investigations made was also introduced. [Exs. 84, 115.]

There is a wealth of evidence corroborating the absence of any joint action. The court could find no motive for any such action. (Or. Op. 6.) Both of the respondent exhibitors were "independents," neither being affiliated in any way with any of the distributors. Sanborn had no theatre interests except his El Monte Theatre and the small late playing Baldwin Park house, and Edwards

owned about 17\* theatres scattered among a number of smaller communities. The court's statement that "I don't believe that Edwards had enough purchasing power to influence the distributors, and certainly Sanborn in his El Monte Theatre, owning simply the El Monte and Baldwin Park Theatres, didn't have any such influence" (Or. Op. 6), and its finding to that effect [F. F. VI, R. 150; F. F. IX, R. 153] is amply supported by the evidence. [See *infra*, p. 70, and R. T. 361, 642, 689, 1449, 1452, 1489, 1620, 1705, 1715.]

Furthermore, it is very important to remember that the distributors who licensed Sanborn's El Monte Theatre did not generally license Edwards' Tumbleweed and Valley Theatres. [F. F. VI, R. 149.] The product of the respondent distributors here involved varied as to quality. Paramount, Loew's, Warner Bros. and Fox generally produced the finest pictures. These four companies, with the occasional addition of RKO, are generally referred to as the "majors." Universal and United Artists also produce some good pictures; Columbia a few good ones and a number of pictures of minor and no importance; and Republic and Monogram are admittedly the producers of "Westerns" and "fillers" and the cheaper pictures. [R. T. 1734-36; see appellant's testimony at R. T. 1174, 1206, 1210, 1221.] In fact, as Mr. Chorak said of the product of the latter two companies, "You give me the three pic-

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\*Not 45, as appellant continually asserts in his opening brief. He reaches his figure by adding to the theatres in which Edwards had an interest a number of theatres owned and operated entirely by other persons who happened to be represented for buying and booking purposes by a corporation in which Edwards was a minority stockholder. [R. T. 49, 52-56.] This buying and booking agency is what was referred to by the witness Smith in his testimony quoted at page 61 of Appellant's Brief. See R. T. 1488-89.

tures that you name and you can take the other seventy.”  
[R. T. 1226, 1228.]

Sanborn, having concededly the largest and best theatre in that entire portion of the San Gabriel Valley and charging the largest admission, was able to secure the finest pictures by purchasing substantially all of the product of the four majors and the better product of United Artists and Universal. Edwards for his Tumbleweed and Valley Theatres secured no product from the four majors and had to rely upon the product of RKO, Columbia, Republic and Monogram, with a few pictures from Universal and United Artists and the balance from producers and distributors not parties to this litigation.\* [R. T. 1704-05, 1771-73; see R. T. 200, 750.] There was, therefore, no reason whatsoever for the four major companies who sold Sanborn alone to have any interest in the playing positions which RKO, Columbia, Republic or Monogram established as between the Edwards unit and the Puente Theatre. Likewise the latter four companies, being unable to sell Sanborn, had no interest in whether or not *he* played ahead or behind Puente. The absence of any motive for joint action between the distributors selling Sanborn and those selling Edwards is obvious. Other affirmative evidence supporting the finding that there was no conspiracy or joint action is shown by the original variations between the distributors in the matter of clearances [Ex. Z], and the changes made by several distributors in clearance by reason of their actual individual ex-

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\*As the Judge said in his Oral Opinion, “We have the El Monte Theatre which is the real competitor in this case. Edwards, generally speaking, is exhibiting pictures from the minor league and the pictures that the plaintiff seeks are mostly those that are exhibited in the El Monte Theatre.” (Or. Op. 10.)

periences in operation. [R. T. 438, 448, 460, 552, 563, 896, 922, 1610.]

There was no evidence whatsoever in contradiction to this testimony. Appellant testified vaguely to the effect that in each of his conversations with the various distributors each asked what availability the other companies were giving him. When pressed, however, to be specific as to the distributors involved all he could remember was "that they discouraged me very much by telling me it is too bad 'but you will have to follow El Monte and all the theatres down there.' I remember that." [R. T. 1237; see R. T. 1211-18, 1233-38.] As far as the major distributors were concerned it was clear from the testimony that they either did not know or did not care about the playing position established for Puente by other distributors. [R. T. 397, 531, 1416, 1607, 1757, 1824.] But in any event the fact that a company was interested in the terms its competitors were offering in a particular area would be evidence of the absence of a conspiracy rather than of its existence. Especially with regards to the minor companies here involved, notably Columbia, Monogram and Republic, the evidence is clear that their determination, while made in the exercise of their own business judgment, was affected by the fact that they had to offer at least as good terms both to the appellant and to Mr. Edwards in his El Monte theatres as were offered by other companies in order to retain the business. [R. T. 206, 228, 236, 270, 1150-51, 1817-18; *Cf.* 496, 1454.] Thus Columbia, which had independently determined to grant the Valley and Tumbleweed Theatres a clearance of 21 days, was forced to reduce that clearance to 14 when Chorak refused to buy their pictures. [R. T. 270,

295.] And the force of competition between distributors is nowhere better shown than in the so-called "Republic letter" which appellant fantastically argues is evidence of a conspiracy. [Ex. 38; Op. Br. 16-17.]

Republic is admittedly one of the weakest in product of all distributors here involved. [R. T. 1206-10.] Because of the nature of its product, primarily "Westerns" and "fillers," it frequently sells "in bulk," as it were. It was negotiating a contract for a number of its pictures for the season 1947-48 to be played in the Edwards' Tumbleweed and Valley Theatres in El Monte. It had been advised that the Puente Theatre was about to open and of the demands of Mr. Chorak for a preferred playing position. [R. T. 1211.] Edwards was asking from the company a 21-day clearance over the Puente Theatre in favor of his El Monte situation. [Ex. J.] Republic had concluded that a 14-day clearance was proper in its independent judgment. [R. T. 1810-11.] However, if it contracted with Edwards to give him such a clearance for its pictures during the coming year, and then found that its competitors, or any of them, were giving Edwards *less* clearance and Puente a *better* availability, Republic would have been in the same position in which Columbia found itself, with Puente refusing to buy its pictures, except that Republic would have been unable to meet such competition because it was bound to Edwards by a long term contract. For that reason Republic's branch manager very wisely told Mr. Edwards' representative that he would grant a 14-day clearance only upon the condition that if any other company serving Edwards granted a more favorable availability to Puente, Republic should be free to meet such competition. The letter proves exactly the reverse of appellant's contention. Rather than



show conspiracy it affirmatively demonstrates the active force of competition in the industry.

The record, therefore, shows uncontradicted, affirmative evidence of the individual action on the part of each distributor and the absence of any joint action or conspiracy, which evidence was believed by the trier of the facts. It is the same situation as presented in the *Westway* case, *supra*, where the court said:

“There is an entire absence of direct evidence to show that their action was concerted, but on the contrary full and convincing evidence that each acted independently on its own judgment.” (30 Fed. Supp. 830 at 833.)

Accord:

*Fifth and Walnut v. Loew's Inc.* (2nd Cir., 1949),  
176 F. 2d 587, 594;

*Windsor Theatre Co. v. Walbrook* (4th Cir.,  
1951), 139 F. 2d 797;

*Fanchon & Marco v. Paramount Pictures, Inc.*,  
*supra*.

- B. Since the Availabilities Established for Puente and the Clearances Granted to the El Monte Area Theatres Were Determined by Individual Application of Correct Economic and Legal Factors to Similar Facts There Could Be No Inference of Conspiracy From the Results Reached.

In spite of the affirmative evidence of individual action appellant here asserts that the court erred in not drawing an inference of conspiracy from the fact that each of the distributors established an availability for the Puente Theatre behind theatres served by it in the El Monte area.

It is the province of the trier of the fact to draw or refuse to draw inferences from the facts in evidence and its refusal to draw any particular inference will be upheld unless clearly erroneous. (*U. S. v. Natl. Assn. of Real Estate Boards* (1950), 339 U. S. 485, 496; *Gary Theatre Co. v. Columbia Pictures Corp.* (7th Cir., 1941), 120 F. 2d 891.) Furthermore, in the face of the affirmative evidence above referred to, the trial court's failure to draw an inference diametrically contrary thereto could be upset only if other facts were of such a nature as to make such affirmative testimony wholly incredible. (*Grace Bros. v. Comm. Int. Revenue* (9th Cir., 1949), 173 F. 2d 170, 174, and cases cited.) These established principles of law are alone sufficient to sustain the judgment below. However, aside from appellant's burden on appeal, the evidence in this record is such that no inference of conspiracy, agreement or wrong-doing could be drawn against these respondents. Their acts in establishing the playing position of the appellant's theatre and in granting the clearances to its competitors were the necessary result of applying the established economic facts and uniformly approved legal rules to a fairly simple factual situation. "Similarity of action under substantially like circumstances affecting each distributor is not proof of conspiracy." (*Windsor Theatre Co. v. Walbrook Amusement Co.* (4th Cir., 1951), 189 F. 2d 797, 799. Accord: *Westway Theatre v. Twentieth Century-Fox*, 30 Fed. Supp. 830, at 833; *Dipson Theatres v. Buffalo Theatres* (2nd Cir., 1951), 190 F. 2d 951, at 958, 960; *Fanchon & Marco v. Paramount Pictures, Inc.*, C. C. H. Tr. Reg. Rep. 64,753, at 64,759, 64,760, 64,764, 64,767; see excellent discussion, *Peveley Dairy Co. v. U. S.* (8th Cir., 1949), 178 F. 2d 363.)

When appellant prior to the opening of his theatre requested each of the distributors to establish a playing position for his theatre "immediately following Los Angeles first run," it became necessary for such distributor to determine the place in the system of successive runs which it would accord that theatre. That obligation was imposed upon the distributors whether or not a competitor demanded clearance and the requests for clearance by Sanborn and Edwards were merely additional evidence of the necessity of determining such position.

Under the decision in *U. S. v. Paramount Pictures, Inc.*, 66 Fed. Supp. 323, Puente's position in that area had to be determined with reference to its grossing potentialities as compared to the grossing potentialities of those theatres in which it was in substantial competition. Each distributor, therefore, had to make three factual determinations: (1) What theatre or theatres served by that particular distributor were in substantial competition with the Puente Theatre?; (2) What was the relative position of the Puente Theatre as to grossing potentiality in comparison with such other theatre or theatres?; (3) What clearance should be granted to the theatre or theatres having the greatest grossing potentialities over its competitor?

As far as the determination of the first two questions is concerned each distributor came to the conclusion that the Puente Theatre was in substantial competition with the three theatres in the El Monte area, and that the El Monte Theatre on the product that theatre played and the Valley and Tumbleweed Theatres on the product those theatres played had a substantially greater grossing potentiality and consequent ability to pay rentals than did the Puente Theatre. Those were likewise the conclusions of the lower court when presented with the same facts as

were presented to the distributors, as declared in its Oral Opinion and its Findings. Upon the third question the distributors came up with varying answers but within a narrow range of variation as might be expected. As to their answers within that range the court, faced with the same facts, believed them reasonable. *When the court itself reached the same factual answers as did the distributors, how can those answers be deemed evidence from which a conspiracy must be inferred?* And the evidence in support of the answers is overwhelming.

1. THE FINDING OF THE COURT THAT THE PUENTE THEATRE WAS IN SUBSTANTIAL COMPETITION WITH THE EL MONTE VALLEY AND TUMBLEWEED THEATRES AND NOT WITH OTHER THEATRES IS AMPLY SUPPORTED BY THE EVIDENCE.

The question as to what theatres are or are not in substantial competition with each other depends almost entirely, as far as this case is concerned, upon the physical characteristics of the area. In this case the judge had before him not alone the unanimous opinion of every distributor respondent, fortified by ample reasons, that the substantial competitors, as far as Puente was concerned were the theatres in the El Monte area and hence its playing position had to be determined with reference to those theatres and not others. [R. T. 268, 293, 303, 351, 442, 444, 466, 517, 527, 549-50, 618, 672, 694, 1615, 1618-19, 1804.] The court also had its own judicial knowledge of the physical facts not only as a matter of law but as a matter of personal familiarity therewith. [R. T. 624, 657; Or. Op. 12, 15.] The court had no doubt whatsoever but that the "competitive area" for the purposes of

this litigation included only Puente and the El Monte area theatres and it so found. [R. T. 654-57; Or. Op. 12, 15; F. F. VI, R. 140.]

An examination of the map [Exs. 1 and A] especially in the light of the foregoing record references will immediately demonstrate the correctness of the court's conclusion. The "trend" of shopping and entertainment traffic is naturally from east to west—from the smaller communities to the increasingly larger towns of El Monte, Alhambra, Pasadena and Los Angeles. [R. T. 466, 527, 739-40, 1492-94.] The theatres lying to the west of El Monte, which include the Temple City, Rosemead, Garvey and Monterey Park theatres, lie naturally within the orbit of Alhambra. [R. T. 617, 654, 677, 1535, 1656.] El Monte, as a substantial, thriving city with complete and comprehensive shopping and entertainment districts, interposes itself between them and Puente. As the court said in its Oral Opinion (p. 12), "I feel the competitive area is the area including El Monte and lying easterly thereof; I do not believe that the competition is with any theatre that lies west of El Monte." Covina residents will go either to Pomona or Pasadena for their major theatrical entertainment [R. T. 740]; Baldwin Park residents to El Monte. [R. T. 444, 528.] As far as Puente is concerned, it was testified to be and found to be within the orbit of El Monte as the important trading and business center. [R. T. 466, 527, 1493; F. F. VI, R. 148.]

The only conflict in the evidence on this point is that created by appellant's conflict with himself. Appellant's original letter [Ex. 115] written November 21, 1947, declared that he was "strictly non-competitive" with any other theatre at all, and he repeated that claim in a letter to the Branch Manager of Loew's under date of June

3, 1948.\* [Ex. 115.] In his complaint, however, he claimed that he was competitive with the theatres in El Monte, Five Points, Baldwin Park, Monterey Park, Covina, Rosemead and Montebello. At the trial he eliminated Montebello and Monterey Park [R. T. 656, 1289], but in his brief on appeal, however, he not only reincorporates Monterey Park, but he adds Garvey, Temple City, and Azusa. (Op. Br. 7, 10, 17, 20, 28, 29.) From the position that he is competitive to *nobody* he has shifted to the position that he is competitive to *everybody*.

In Appellant's Opening Brief he advances the untenable proposition that the court should have determined what theatres were in competition with *El Monte* rather than what theatres were in competition with his own house. (Op. Br. 28, 33 and *passim*.) As far as appellant is concerned he can fairly be interested only in his playing position with respect to those theatres which are in substantial competition with *him*. Whether or not some other theatre may compete *with El Monte* is of no concern to appellant if it is not in substantial competition with *him*.

The unassailable validity of the finding as to substantial competition eliminates from the discussion questions concerning the playing position, clearances, grossing potentialities, and other factors involving those theatres which were found not to be in substantial competition with appellant.\*\* We may thus refrain from extended argument on the treatment accorded them by the distributors. How-

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\*"I am not any competition (let alone substantial competition) to anyone due to special circumstances of rural and Mexican population." [Ex. 115.]

\*\*For this reason the court indicated in its opinion denying a new trial that it had been in error in making findings of clearance with respect to these theatres after having found that they were not in the area of substantial competition. [R. 190.]

ever, in so doing we do not want the court to think for one moment that the intemperate accusations in appellant's brief are founded upon fact since they are not. His claim that he has been accorded "last run" behind all these theatres and is required to play pictures at higher prices long after they have played them is entirely without foundation. Computations furnished the court below in our briefs, and based upon Exs. N to Q, T, Y to X, HH, and KK, show that during the period of approximately eight months between the opening of the theatre and the filing of the complaint appellant had played not less than 54 feature pictures ahead of at least one and in many cases three to four of these other theatres, and in all except five of such instances paid substantially less\* for such right than did such theatres.

2. THE FINDING OF THE COURT THAT THE PUENTE THEATRE HAD A SUBSTANTIALLY POORER GROSSING POTENTIALITY AND CONSEQUENT ABILITY TO PAY FILM RENTALS THAN ITS COMPETITORS IN THE COMPETITIVE AREA IS AMPLY SUPPORTED BY THE EVIDENCE.

In its Oral Opinion the court said:

"There is absolutely no question in my mind that the Puente Theatre cannot compete so far as license fees are concerned with the other theatres involved. It cannot pay the price. It cannot pay the price, and, even if I were to hold in their favor and direct each be given an equal clearance, the Puente Theatre

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\*In many instances Puente paid less than 50% of the film rental of one or more of the other theatres and played ahead of them. *E. g.*, "Three Daring Daughters" (Loew's): Puente paid \$62.50 and played ahead of Monterey Park at \$216.00, Covina at \$137.50, and Rosemead at \$121.50. [Ex. T.]

could not in real competition compete with the Tumbleweed, the Valley or the El Monte." [Or. Op. 13-14; F. F. VI, R. 148.]

The physical situation of the respective theatres is itself conclusive of the validity of the court's findings. The El Monte theatres are in a centrally located, highly congested urban area, with the established and thriving City of El Monte as a nucleus, exercising all the drawing power of a modern urban community over a large area and many thousands of prospective movie-goers. Sanborn's El Monte Theatre is the largest and finest in that section of the San Gabriel Valley and charges the highest admission; physically, the Tumbleweed is at least the equivalent of appellant's theatre. [R. T. 109, Exs, C, I.] The Puente Theatre, on the other hand, is located in a wholly rural area, its clientele composed, as appellant himself states, "mostly of Mexican nationals\* and local farmers." [Ex. 84.] It is on what is in effect a side road in an unincorporated village with no drawing power whatever, and with no real potential patronage other than that of the bare 2,000 people in its immediate area. It was the unanimous opinion of the distributors that because of these factors the Puente Theatre could not be expected to produce for them anywhere near what the El Monte theatres could.

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\*The effect of this feature on the grossing potential of the Puente area, with 43% of its inhabitants being Spanish-speaking, is graphically illustrated in the evidence. Tuesday was set aside in Puente for an all-Spanish program. From the date of its opening until the filing of the complaint, the theatre *averaged* a gross of \$168.42 for each such program, which was *more* per unit than that ever grossed by the theatre on any picture distributed by the defendants, including those like "Red River" and "Command Decision" which it played ahead of El Monte. The average per unit gross on its 26 most productive English language pictures was \$103.57. [See Appendix, Part B; R. T. 1255-56.]



[R. T. 319, 355, 466, 564, 1443, *et seq.*, 1483, 1623, 1643-44, 1672, 1676, 1807, 1815.]

The evidence in the record as to the actual results of the theatre operations in Puente as compared to those in the El Monte area demonstrates the soundness of the distributors' conclusions and the court's findings as to grossing potential and consequent ability to pay rentals, and also completely justifies the playing position accorded Puente.

Appellant's brief is most misleading on this subject. It practically ignores the El Monte Theatre which appellant conceded at the trial could far out-gross Puente. [R. T. 470, 482, 485, 564.] It equally ignores the large, modern Tumbleweed Theatre which was treated by witnesses and the court alike as being in the El Monte area, although fortuitously located just outside the political boundaries of the city.\* It levels its entire attack upon the smaller, older Valley Theatre although the evidence was clear that the Valley and Tumbleweed played the same pictures each within a few days of the other. Furthermore, appellant's use of figures is wholly unsound.

On page 20 of the Opening Brief appellant sets forth a table of grosses and rentals paid. He argues from the table that because the Puente Theatre grossed more than the Valley and paid total rentals in excess of the Valley, the finding of the court that Puente did not have the grossing potentiality of its competitors and could not pay equivalent rentals is clearly erroneous. The table presented is, to say the least, highly misleading and the conclusion drawn demonstrably false.

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\*See footnote, p. 8, *supra*.

The table itself shows that the Puente Theatre grossed substantially less than half as much as did Sanborn's El Monte Theatre and also less than half as much as did the two Edwards' theatres in the El Monte area. The Sanborn theatre paid almost three times as much in rentals as did Puente. As far as the figures given are concerned they show that Puente did pay almost as much in gross rentals as did the two Edwards' theatres. However, upon the matter of gross rentals the statement is entirely misleading for the simple reason that the comparison *is not made with respect to the particular distributor respondents who received the particular rentals, nor with respect to the same pictures.*

It must be remembered that Puente was the only one of the four theatres concerned that purchased the product of all the distributors. As pointed out, Sanborn, in the El Monte area, licensed exclusively the product of the major companies. Edwards had none of the major product and relied almost entirely upon the pictures distributed by Columbia, RKO, Republic, Monogram and companies not parties to this suit.\* Puente, on the other hand, had its choice of all the products of all the distributors and could and did select the very best pictures from each.

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\*The rental figures given by appellant for the Valley and Tumbleweed do not include any sums paid by Edwards for product distributed by others than the respondents. That this is substantial is indicated by the testimony that Edwards played 312 pictures in the space of a little over a year in his Tumbleweed Theatre and 240 in the Valley Theatre [Ex. SS, R. T. 1709], which was greatly in excess of those sold by the four respondents who were serving him. [Exs. 28, 28A, 29, 33, 40, 41, 57, 58, 169, 170.] There was no evidence as to rentals paid non-defendant distributors.

The total rentals paid by appellant were therefore paid to *ten* distributors while those paid by Edwards' theatres were paid to *four* only. The total grosses received by Puente were the result of the exhibition of all the best pictures of all the companies;\* those received by the Tumbleweed and Valley were from the pictures of the three weakest companies, plus the "minor-major", RKO.

Obviously Columbia, RKO, Republic or Monogram in determining the playing position of Puente with respect to the two Edwards' theatres in El Monte, had to consider what the return would be *to them on their pictures* from the respective exhibitors. What Puente was willing or able to pay *Loew's* for its pictures (the best in the industry) was not a matter with which *Columbia* or *Republic* were or properly could be concerned. It is, therefore, essential to see how the gross rental expectancy affected *each individual distributor*.

Mr. Sanborn's El Monte Theatre, playing the product of the major distributors and hence by far the most desirable pictures, was "the real competition in this case . . . and the pictures that the plaintiff seeks are mostly those that are exhibited in the El Monte Theatre." [Or. Op. 10; R. T. 1204-10, 1220-22, 1226-29.]\*\* There fol-

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\*And also the Spanish pictures which accounted for \$9,668.28 or 17½% of the total gross figure given by appellant. [Ex. DD.]

\*\*Appendix, Part B, attached gives a list of the 26 pictures producing the highest grosses in the Puente Theatre from opening to time of trial, with grosses and playing position. All but three (one each from Columbia, Monogram, and RKO) were pictures released by distributors serving the El Monte Theatre alone.

lows a table showing the gross rental paid to each distributor by Sanborn's El Monte Theatre on the one hand, and appellant's Puente Theatre on the other hand from the opening of the Puente Theatre to March 31, 1949:\*

<u>Distributor</u>	<u>Puente</u>	<u>El Monte</u>
Fox	\$2,391.45	\$ 8,970.20
Loew's	2,306.66	7,175.30
Warner Bros.	1,458.68	6,173.18
Paramount	1,443.27	5,333.65
Universal	983.74	5,414.48
United Artists	883.92	2,141.00
	<hr/>	<hr/>
	\$9,467.72	\$35,207.81
	<hr/>	<hr/>

Thus it appears, from appellant's own figures, that the El Monte Theatre paid from three to five times as much in film rental to the distributors serving it as did Puente for the same pictures.

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\*This table and the one following are copies of compilations made by *appellant* in his brief below filed prior to the court's opinion and findings and are purportedly based on cut-off cards in evidence. We have no information as to the method used in arriving at the table. Our own examination of the exhibits indicates that it is incorrect in appellant's favor. For example, the appellant's figures for Monogram are as follows: Puente, \$630.52; Tumbleweed, \$699.00; Valley, \$437.50. Actually the Monogram cut-off cards [Exs. 169, 170, 172] show the following: Puente (28 pictures), \$678.02; Tumbleweed (27 pictures), \$839.00; Valley (22 pictures), \$626.50.

The following table gives the same information for Puente, Valley and Tumbleweed Theatres individually, and then for the combined Tumbleweed-Valley situation:

Distributors	Puente	Tumbleweed	Valley	Tumbleweed- Valley
RKO	\$1,835.64	\$3,369.17	\$2,060.43	\$ 5,429.60
Columbia	1,394.01	2,197.58	1,839.15	4,036.73
Republic	418.00	967.25	875.00	1,842.25
Monogram	630.52	699.00	437.50	1,136.50
	<u>\$4,278.17</u>	<u>\$7,233.00</u>	<u>\$5,212.08</u>	<u>\$12,445.08*</u>

These figures show that RKO, Columbia, Monogram and Republic received three times as much film rental from the Tumbleweed and Valley as was paid to them by Puente for the same pictures. It also shows that the Valley Theatre alone paid substantially more rental to every distributor serving it (with the exception of Monogram)\*\* than did Puente.

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\*In addition the Tumbleweed paid \$128.00 to Universal, \$608.95 to United Artists, and \$230.00 to Warner's; the Valley paid \$202.25 to United Artists and \$133.00 to Warner's.

\*\*The difference as to Monogram is due to the fact that (1) Puente played more Monogram pictures than the Valley, and (2) Puente played Monogram's only good feature picture "Babe Ruth Story" [R. T. 1126, 1136-37] and paid \$118.00 rental, while Valley did not play the picture. On the Monogram pictures played by both theatres, Valley paid more *for every one* than did Puente. [Exs. HH, 169, 170, 172.]

The above are appellant's own computations. Respondents attach as Appendix, Part C, a computation made by them showing the average film rentals paid per picture by the four theatres involved during the period from the opening of the Puente Theatre to the filing of the complaint herein. The table shows that Sanborn's El Monte Theatre paid an average of \$214.74 per picture to the distributors serving it, as compared to the average of \$51.34 paid by Puente and that the Tumbleweed and Valley paid an average of \$53.83 and \$48.03, respectively, as compared to Puente's average on the same product of \$28.43.

Appellant gives "examples" of payments by Puente "comparable to those paid by the protected Valley Theatre." (Op. Br. 18, 22.) His "examples" are isolated, and wholly unique; thus their use is highly misleading. He cites Republic. Out of eleven Republic pictures played by both Puente and Valley up to the date of the complaint, Valley paid from 20% to 65% more than Puente on nine [Ex. N] including "Bill and Coo", cited by appellant. As regards "Red River", where Puente played first with \$504 gross, appellant fails to point out that Tumbleweed, playing *after* Puente and before Valley, grossed \$1,145 on that picture, or a total in Tumbleweed and Valley for their late playing of over \$1,500. [R. T. 1666-67.] A cursory examination of Exhibits N, O, P, Q, T, V, W, X, HH and KK will quickly show that Puente never paid but a fraction of what its competitors paid for the same pictures.

These computations which were before the trial court clearly substantiate its finding. There was other equally

forceful evidence in the record. It was admitted by appellant that the Puente Theatre could not gross what the El Monte Theatre grosses [R. T. 482, 485, 1192, 1194] and that Chorak would not pay El Monte film rental. [R. T. 1076, 1186, 1192-94.] Loew's offered appellant the right to play ahead of El Monte if he would pay as much money, and appellant replied "I could not begin to approach their rental." [R. T. 564.]

The evidence as to "competitive bidding" is enlightening. In January, 1949, Paramount offered appellant the right to bid for the run against the El Monte Theatre on all pictures. [Ex. S.] RKO made a written offer to permit appellant to bid against the Edwards' theatres in February of that year. [Ex. JJ.] He could have had bidding from Fox [R. T. 1630] and Loew's. [R. T. 564.] He never made a competitive offer on a single picture to the date of trial. In answer to Paramount's invitation appellant told that company "that in his opinion he could not gross in Puente as much as El Monte pays in film rental." [R. T. 470.] That appellant was correct is shown by Appendix, Part D, attached. This gives comparable figures between Puente and the El Monte Theatre on the 36 leading pictures of the majors, played in both theatres. It shows that on such top pictures Puente grossed approximately \$10,500 which was over \$2,000 *less than the amount El Monte paid in film rental* for the identical pictures. On the pictures "Red River" and "Command Decision," mentioned in appellant's brief at page 65 as demonstrating his grossing potential upon a prior run

basis, Puente's grosses were approximately \$500 in each instance. The average El Monte Theatre gross on pictures from major companies was approximately \$1,200 per picture. [Exs. 90, 103, 118, 136, 154, 164.]

Respondents' Exhibit PP is conclusive support for the court's finding. This was a "play-off" on the Paramount picture "Pale Face" (a top Bob Hope attraction), showing successive exhibitions starting from Los Angeles and running through the entire San Gabriel Valley with dates and rental returns. The picture was played by Puente on its preferential availability from Paramount of 7 days after El Monte. In Puente it was the fifth largest grossing picture appellant ever played. (Appendix, Part B.) In the sequence of 23 theatres Puente played *ninth*. On its percentage-of-gross return to the distributor it was *twentieth*, paying less money than all except three small theatres in the entire valley. Witnesses described the play-off as "typical." [R. T. 1401-06.] It is a graphic demonstration of the soundness of the distributors' judgment as to Puente's potential. There is not only substantial evidence to support the court's finding; the finding is the only one possible under the facts.

3. THE FINDING THAT THE CLEARANCES ESTABLISHED WERE REASONABLE AS TO LENGTH IS ENTIRELY SUPPORTED BY THE EVIDENCE.

Appellant has made no substantial point that the periods of time determined by the various distributors as proper clearance were unreasonable, his argument being entirely that no clearance at all should have been granted. The



periods determined by the distributors varied from 7 days to approximately 21 days, or one to three weeks, with the majority giving a clearance of 14 days or two weeks. There was evidence that clearance is reckoned in units of weeks (7, 14 or 21 days) because of the convenience of exhibitors [R. T. 1406, 1453-55] so that the variation was between one week and three weeks with the majority of the distributors choosing two. Under the pressure of competition Columbia, which had established the longest clearance of three weeks was compelled to shorten its clearance to 14 days or two weeks, which was the availability at which it served appellant during the entire period. [R. T. 269-70.]

The underlying evidence as to what period should constitute reasonable clearance was that of the distributors and demonstrated conclusively that they reached their answers based upon the appropriate factors referred to in the *Paramount* decision and upon their wide experience in the industry. [R. T. 197, 268, 351, 440, 448, 466, 471, 486-87, 547, 551, 612, 673, 1420, 1443, 1453, 1482, 1607-13, 1636, 1672, 1806, 1823.] In fact, Paramount, which granted appellant 7 days, had originally established 14 days and reduced the clearance because of an unusual experience on one picture. [R. T. 440.] The two-week clearance is normal in the entire area. [R. T. 439.] It was the clearance granted Pasadena over the El Monte theatres and the clearance granted Alhambra over most of its subsidiary communities. [Ex. Z.] The 14-day clearance was also the clearance held reasonable in the

case of *Westway Theatre v. Twentieth Century-Fox, supra*. Additional evidence as to its reasonableness was presented by the action of the Appeals Board of the Motion Picture Arbitration Tribunal set up under the *Paramount* consent decree and referred to in the testimony. In the case of *In re W. J. Edwards, Jr.*, Opinion No. 55, that Board granted clearance to the El Monte Theatre over the Tumbleweed Theatre *one mile* away at 28 days or *four* weeks. [R. T. 752.] In the case of *In re Steve Chorak*, Opinion No. 124, the Tribunal established the clearance in favor of Laguna Beach over the San Clemente Theatre, which the appellant here was then operating and which was located approximately *12 miles* away, at 7 days or *one* week. [R. T. 1043-45.] The distance here involved is approximately *six miles* which indicates the reasonableness of the clearance of 14 days or *two* weeks. There was no evidence presented that indicated any unreasonableness in any of the varying clearances granted, and the court found no such unreasonableness. [Or. Op. 9-16; F. F. VI, R. 147.]

The entire record demonstrates, therefore, that the factual determinations made by the distributors in this case were the inevitable result of the application of established legal and business principles to uncontrovertible fact. No inference of conspiracy could be found from the fact that a similar result was reached. Obviously two

and two still make four for motion picture distributors as well as other persons. Upon the same facts the lower court reached the same result as did the distributors. We submit that it could not do otherwise. An inference of conspiracy would arise only if some other result had been reached. (*Dipson Theatres, Inc. v. Buffalo Theatres, Inc.* (2nd Cir., 1951), 190 F. 2d 951.)

Appellant attempts to draw some inference of improper action on the part of the *distributors* from the fact that the *exhibitors* Sanborn and Edwards each requested a clearance for their respective theatres in the El Monte area from the particular distributors who were licensing pictures to them. As the court found, and is obviously the case, this was only the normal action of normal businessmen. [F. F. VII, R. 151.] Under the principles of *U. S. v. Paramount Pictures, Inc.*, already referred to, an exhibitor is entitled to clearance over his competitor if he meets the qualifications stipulated in that opinion, and reasonable clearance in favor of such exhibitor is "essential to the distribution and exhibition of motion pictures and of benefit and necessary for the reasonable conduct of its business." (66 Fed. Supp. 323, 342.) It was and has always been the custom in the motion picture industry for exhibitors to demand establishment of particular availabilities or clearances whenever they open a new theatre or whenever a new theatre comes into their area. [R. T. 1460.] These exhibitors did no more in their request for clearance against appellant than did appellant in his request to play immediately following first

run Los Angeles, and hence at least a month or more ahead of Messrs. Sanborn and Edwards.

In the *Westway* case, *supra*, the defendant exhibitor, together with other exhibitors in the same area, wrote similar letters demanding clearance. The court there declared there was nothing unusual in this fact. It said (30 Fed. Supp. 830, at p. 833): "It seems to be a common occurrence in the business that older and established theatres in the vicinity of a new theatre demand or at least seek a clearance over the new theatre."

Even if the exhibitors agreed beforehand between themselves to make such requests, as found by the court,\* it does not follow that there was anything wrongful in the demands. Each exhibitor had a right to ask for clearance and the fact that each understood such request was to be made by the other does not make their action wrongful. In other words, an agreement to do a legal act in a legal way does not constitute conspiracy. And, as pointed out, the determination of whether to grant clearance and what clearance was to be granted was based upon the distributors' own individual appraisal of the facts. In fact, Mr. Edwards' request for clearance in favor of his Azusa theatre, and for 21-day clearance in favor of his "El Monte situation" was denied by all distributors.

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\*The court's finding in this connection was in the face of direct denials by both Sanborn and Edwards [R. T. 727, 778, 1720, 1774] and was based solely upon the fact, which we submit was purely coincidental, that the letters from these exhibitors were dated within a day of each other. [R. T. 753.]

II.

**The Finding That None of the Respondents Have Established or Maintained in This Area an Arbitrary, Uniform, or Unreasonable System of Runs and Clearances Is Fully Supported by the Evidence.**

Throughout appellant's brief it is continuously asserted that he has been made the victim of what he describes as a "fixed, non-competitive system" of runs and clearances, conspiratorial in origin, which he asserts was directed against him with the sole purpose and effect of preventing him from competing with other theatres. Under the record the claim has absolutely no basis whatsoever.

We have pointed out the economic factors which require, as every court has recognized, (i) that pictures must be distributed by a method of successive runs; (ii) that where competition exists there should be adequate clearance between such runs for the protection of distributors and exhibitors alike; (iii) that in determining the sequence of runs and the extent of clearance the primary factor must be the relative grossing potential and consequent ability to pay rentals of the theatres in the area involved. From an application of these factors by each distributor in order to operate his business it must be obvious that a pattern of distribution will inevitably occur. The physical and economic factors in any area are identical for each distributor. If a particular theatre or area has a greater grossing potentiality than another, that fact

applies whether the pictures involved are those of Paramount or those of Loew's.\*

There can be no dispute over the fact that Los Angeles has a greater grossing potentiality than Pasadena, that Pasadena has a greater grossing potentiality than Alhambra, that Alhambra has a greater grossing potentiality than El Monte, and that El Monte has a greater grossing potentiality than Puente. [See Ex. PP.] Inevitably under the system of successive runs the pictures will play first in Los Angeles, then Pasadena, then in Alhambra, then in El Monte, and then in Puente. The fact that each distributor so licenses the exhibitions is no more evidence of a conspiracy than is the fact that every bank charges more interest on its loans than it pays on its deposits.

Furthermore, the "pattern" inevitably tends to become uniform by reason of the fact that uniform availability from all distributors serving a particular theatre is almost a necessity as far as the exhibitor is concerned. As the testimony shows he cannot adequately buy or book his pictures unless his availabilities are substantially the same from each of his sellers. [R. T. 1453-56, 1508, 1631-33.]\*\* In addition, the element of intense competition between the distributors for the business of a particu-

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\*"In sum, the limitation of the plaintiff to a 21-day availability finds support in special factors which affect the distribution of motion pictures. As these factors called for the same result, they produced an identity which did not spring from design, but from similarity of situations." *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, C. C. H. Tr. Reg. Rep. 64,753, at 64,767.

\*\*Uniformity was what Chorak wanted. [Letter of Nov. 21, 1947, Ex. 115.] His complaint is that he was not given *uniformly* a better position.

lar exhibitor impels uniformity, especially among the distributors with the poorer product. If the exhibitor gets a better playing position from any distributor, he uses that to force the other distributors into an equally better position on the threat of a refusal to buy, just as appellant did in this case. [R. T. 269-70, 496, 1456.] As Judge Yankwich said in *Fanchon & Marco v. Paramount Pictures, Inc.*, C. C. H. Tr. Reg. Rep. 64,753, at 64,764:

“As a general rule, the same availability is established by all producers. But here, again I am convinced that this was not the result of concert but flowed from the very nature of the clearance system. Indeed, instances exist of different availabilities [in] the same theatre for the productions of different companies. Whenever this occurred, it brought objections from theatre-owners who complained that, by this method, they were prevented from relying upon a ‘constant flow’ of pictures.”

The “pattern” in the San Gabriel Valley was just exactly the inevitable pattern which the laws of economics compelled. Alhambra played one week behind Pasadena. Covina and El Monte, as the northern and southern urban centers of the San Gabriel Valley, each played 14 days behind Pasadena. The theatres lying west of El Monte, such as the Rosemead, Garvey and Monterey Park theatres, being within the orbit of Alhambra, played behind Alhambra, but sufficiently so to permit the El Monte theatres a priority over them in the succession of runs under ordinary conditions. Over a period of years, during which time there was no substantial change in the relative economic situation, these areas and theatres found and maintained their inevitable position. There was nothing “fixed” about this “system” except as it was fixed

by the laws of economics.\* From 1930 to the building of the Puente Theatre in 1947 there were no changes in the relative economic statuses of the different areas and very few new theatres built. [R. T. 740-43.] These were years of depression followed by strict war-time restrictions against construction. When new theatres were opened, however, they were accorded a new position dependent upon the same economic factors. The Tumbleweed Theatre in the El Monte area, constructed in 1939, was compelled, even after litigation in the Arbitration Tribunal commenced by Edwards, to accept a position of 28 days behind Sanborn's new El Monte Theatre, because the latter had a substantially better grossing potential. [R. T. 1706.] When the Temple City Theatre was built by Edwards, he was compelled by the distributors to play from 7 to 14 days behind the larger San Gabriel houses of which he owned one, which themselves played behind Alhambra. [Ex. Z; R. T. 1716, 1737.] When the Crown Theatre in downtown Pasadena was remodeled to make it equal in stature to the existing first run theatres, it was given the opportunity for such first run showing [R. T.

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\*Of course it was this "system" to which both the court and counsel were referring in the quotation given on page 44 of Appellant's Opening Brief and to which the witness Eckhart referred to the testimony quoted on pages 43 through 46. In fact, as appellant has carefully refrained from pointing out, Mr. Eckhart fully explained this testimony on the next page after that quoted by appellant [R. T. 700] where he was asked if he knew how the clearance system had been set up, and replied: "Well, yes, I know how it was. It was set up by competitive selling and where you get the most money, and so on and so forth, but it has been the practice and custom for clearances of various characters to be established everywhere." (See *Westway Theatres v. Twentieth Century-Fox*, 30 Fed. Supp. 830; *Windsor Theatre Co. v. Walbrook Amusement Co.*, 94 Fed. Supp. 383, 390, s.c. 189 F. 2d 797.)



501, 1447.] The new drive-ins occasioned many changes. [*E. g.*, R. T. 1425, *et seq.*; R. 182.] Thus, rather than being "fixed", the system was, as Judge Yankwich found in the *Fanchon & Marco* case, "in flux."

When appellant's Puente Theatre was constructed, it too had to find its position in the sequence of successive runs, and that position had to be determined with respect to its substantial competitors, which were the El Monte theatres. By the laws of economics that position had to be inferior to that of those theatres. Basically appellant's contention is that the erection of his theatre at Puente necessitated *as a matter of law* the disregard of the entire basis of the distribution of pictures, and the establishment by one or more of the distributors of a playing position for his theatre with reference to its competitors completely unjustified by the character of the community in which it was located, in order to avoid violation of the anti-trust laws. If the distributors had given Puente the preferred position which it demanded in violation of ordinary common sense business principles, it would have been an act in violation of the rules of law expressed in the cases and would then, and only then, be evidence from which an inference of conspiracy could be drawn.\*

The uniform, arbitrary and fixed systems of clearance which have been condemned by the courts have been those

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\*"At best an inference of conspiracy would only arise if it appeared more to the interest of the distributors involved to adopt *a different pattern of distribution than the one actually employed.*" *Dipson Theatres v. Buffalo Theatres* (2d Cir.), 190 F. 2d 951, 958.

which flouted such economic laws—not those which followed them.\* *U. S. v. Paramount Pictures, Inc., supra*, condemned the fixed system of runs and clearances there under survey because it “was designed to protect their [the distributor defendants’] *theatre holdings* and safeguard the revenue therefrom” and because it was one “which prevented any effective competition *by outsiders* . . . . It involved *discrimination* against persons applying for licenses and seeking runs and clearances for their theatres, because they had no reasonable chance to improve their status by building or improving theatres *while the major defendants possessed superior advantages*.” Thus “the system of clearances and runs was such as to make competition *against the defendants* practically impossible.” (85 Fed. Supp. 881, 888.) And the court *specifically* refused to find that any general policy of discrimination against exhibitors existed, saying, “The decision of such controversies as may arise over clearances should be left to local suits in the area concerned.” (66 Fed. Supp. 323, 342; see 85 Fed. Supp. 881, 888.)

The Supreme Court in *U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131, condemned only those fixed and uniform clearances which “had no relation to the competitive factors which alone could justify them . . . and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade.” [P. 146.] And in *Schine*

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\*As Judge Yankwich said (*Fanchon & Marco v. Paramount Pictures, Inc.*, C. C. H. Tr. Reg. Rep. 64,753, 64,757), “No cases exist which hold that the system, *in itself*, is a violation of anti-trust laws. To the contrary, all the decisions which have come from the higher courts postulate the legality of these restrictions, *condemning only unreasonableness in the preferences*.”

*Theatres v. United States*, 334 U. S. 110, 124, the court reversed the District Court's finding of "unreasonable clearances" on the specific ground that the lower court had not found in what manner the clearances were unreasonable.

The cases relied upon by appellant are themselves strong authority that clearances, though uniform, are not conspiratorial or illegal. In every case, the court's condemnation rested on a finding that the distributors had *disregarded* the economic factors involved, induced to do so by the intent to favor some particular person or company for ulterior motives.

*Goldman v. Loew's Inc.* (3rd Cir., 1945), 150 F. 2d 738, was a monopoly case under Section 2 of the Act. In that case Warner Bros. operated seven theatres in downtown Philadelphia and had all of the product of all distributors first run. Plaintiff built a theatre in the same immediate area, found to be substantially equal in all respects. He was refused pictures by every distributor, although the trial court specifically found that if his theatre had been owned by Warner's each distributor would have sold pictures to it. The Court of Appeals also found from the evidence that an agreement between distributors not to sell plaintiff was shown by necessary inference and failure of adequate denial (p. 743), and that such agreement restrained commerce.

In *Interstate Circuit v. United States* (1939), 306 U. S. 213, the agreement found to have been made by the distributors was a straightforward price-fixing agreement—namely, that they would not sell any picture to a competitor of the defendant circuit who charged less than 25¢ admission. In *Bigelow v. RKO* (1946), 327 U. S. 525, there was again a price fixing conspiracy found and the

clearance was declared to have been so arranged as to benefit the defendant distributors' own theatres.\* In *Ball v. Paramount Pictures, Inc.* (3rd Cir., 1948), 169 F. 2d 317, plaintiff, an independent, took the lease of a theatre away from a company affiliated with Paramount, one the distributor defendants. Thereafter all distributors refused to give plaintiff the run the theatre had theretofore enjoyed, even though he offered substantially more money therefor than did the competing theatre which Paramount had erected in the same area. By a split decision the Circuit Court found conspiracy in violation of law.

In *Bordonaro Bros. Theatres v. Paramount Pictures* (2nd Cir., 1949), 176 F. 2d 594, the jury found favoritism of an affiliated theatre over an independent theatre which was larger and at least as favorably located. The Court of Appeals affirmed solely on the ground that there was evidence to sustain the finding of the trier of the facts.\*\* In *Milwaukee Towne Corp. v. Loew's Inc.* (7th Cir.), 191 F. 2d 561, the tryer of the facts found that the particular clearance system had been entered into by agreement, was designed to create a monopoly in favor of theatres of the distributors, especially Fox and Warner's, and that the plan had not been abandoned. The appellate court affirmed because there was some evidence to support the finding.

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\*The Court of Appeals said, with reference to the uniform pattern of runs and clearances: "We do not say that from that fact alone the court could infer an illegal conspiracy. *We think it could not do so.*" (150 F. 2d 877, 883.)

\*\*The court said:

" . . . Where more than one inference can reasonably be drawn from the proof, it is for the jury to determine the proper one." (At p. 597.)

It appears clearly, therefore, that each decision cited by appellant was based upon a finding of unreasonable and arbitrary discrimination without regard to the factors which the courts have held should be considered. On the other hand, there is a host of cases, including the most recent ones, where the method of distribution here utilized has been discussed and upheld and where the establishment of an inferior playing position for the plaintiff's theatre or the grant of clearance to his competitors has been found reasonable and not in violation of the law. In contrast to those cited by appellant, these are cases in which the facts are almost identical with those in this case.

The *Westway*\* and *Fanchon & Marco*\*\* cases have already received comment. Factually, they are very close to this case and the issues are identical. Each discusses and disposes of the same legal contentions made here by appellant, and the opinions are compelling in reasoning.

In *Windsor Theatre Co. v. Walbrook Amusement Co.* (D. C. Md., 1950), 94 Fed. Supp. 388, the court again reviewed the "system" of distribution. It found there, again upon almost identical facts as those in our present case, that the refusal of the distributors to serve plain-

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\**Westway Theatre v. Twentieth Century-Fox Film Corp.*, 30 Fed. Supp. 830, affirmed on opinion below, 4th Cir., 113 F. 2d 932. The case distinguishes the *Interstate* case.

\*\**Fanchon & Marco v. Paramount Pictures, Inc.*, C. C. H. Tr. Reg. Rep. 64,753.

tiff's new theatre was based upon the independent judgment of each of the distributors and that "the only motive actuating each of them separately was their ordinary business interests in exercising their lawful right to select their customers." (P. 391.) The cases cited here by appellants are discussed and distinguished. That decision was affirmed by the Court of Appeals, 189 F. 2d 797, 798-99, in the following language:

"Whether a conspiracy in restraint of trade exists is a question of fact. As this Court has on numerous occasions said, we are not at liberty to disturb a finding of fact made by the District Court unless it be clearly erroneous. [Citing cases.] We find no such error in this case. A careful examination of the record fails to show any horizontal conspiracy among the distributors in selling to the larger and longer-established Walbrook Theatre in preference to the newly-established Windsor Theatre. It seems to this Court quite natural that the distributors would not be prone to substitute an unknown customer for a proven one. This Court cannot see how the preference of one exhibitor over another is, *per se*, a combination in restraint of trade. Ineed, every 'exclusive' contract has that effect. As the District Court concluded: 'There is no evidence tending to show any conspiracy or concerted action by the distributors; that is, there is no "horizontal" conspiracy in these cases. To some extent it may be said that some of the distributors have much of the time acted similarly with respect to Rosen and Goldberg; but

similarity of action under substantially like circumstances affecting each distributor is not proof of conspiracy.’ ”

In the very recent decision of *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.* (2nd Cir., July 25, 1951), 190 F. 2d 951, one of the causes of action involved plaintiff's claim that defendant theatres in the same area were given priority of run and clearance over him by all major distributors. The lower court found for the defendants, and its finding was affirmed. Judge Hand pointed out that an inference of conspiracy “would only arise if it appeared more to the interest of the distributors involved to adopt a different pattern of distribution than the one actually employed. Thus there is nothing illegal in the mere fact that Dipson could not get all the pictures it wanted for the runs it wanted.” (P. 960.) The court contrasts the case with the *Ball* and *Goldman* cases, relied on by appellant. The court also pointed out that *U. S. v. Paramount Pictures, Inc., supra*, did not hold particular clearance systems illegal, citing as authority the Second Circuit's own decision in *Fifth & Walnut v. Loew's Inc.* (1949), 176 F. 2d 587.

The *Fifth & Walnut* case was another case in which plaintiff's claim was similar to the one here advanced—namely, that other exhibitors had been given priority of run over his theatre. The lower court there charged the

jury that if each distributor had acted in accordance with its own individual business judgment uniformity of action was no evidence of a conspiracy, and the jury verdict was in favor of the defendants. That verdict was affirmed by the Court of Appeals in a strong opinion. The method of distribution was also considered and approved by the affirmance of a judgment for defendants in *Gary Theatre Co. v. Columbia Pictures Corporation* (7th Cir., 1941), 120 F. 2d 891, by a decree for defendants in *McLendon v. Loew's Inc.* (D. C. Tex., 1948), 76 Fed. Supp. 390, and by a decree denying preliminary injunction after evidence taken in *Meiselman v. Paramount Pictures, Inc.* (D. C. N. C., 1949), 86 Fed. Supp. 554, affirmed 4th Cir., 1950, 189 F. 2d 194.

The so-called "system" here involved is simply the essential method of distribution as affected by ordinary competitive factors. It is "fixed" only by the laws of economics and the effect of those factors. Appellant's relative playing position in a series of successive runs is the result of factors of his own choosing and over which he had entire control. Those factors determine his success or failure in the competition for priority of run. His complaint that the "system" makes him "non-competitive" is simply nonsense. Inevitably he competed for his playing position since that position was determined by the grossing potentiality of his theatre as compared with that of another. His fundamental complaint is that because of his own choice of location and other factors he was not able to win the competition.



III.

**The Finding That None of the Respondents Fixed Appellant's Admission Prices But That Such Prices Were Fixed by Appellant in His Own Discretion Is Fully Supported by the Evidence.**

There is not one iota of evidence in this record that any respondent in any fashion attempted to fix or determine appellant's admission prices. Appellant's own evidence completely disposes of any such claim. He testified that he determined his admission prices by making a trip throughout the territory and copying the admission prices posted on box offices of other theatres. [R. T. 1248.] He testified flatly that no distributor attempted at any time to fix his admission prices. [R. T. 942, 1247, 1306, 1309, 1311, 1314, 1315.] His admission price letter [Exs. 81, 115] was obviously an attempt to try to trick the distributors into some garbled statement. It did not work. Appellant never reduced his prices. He never intended to. He was just trying to manufacture evidence. What the distributors might have done if appellant had reduced his prices is entirely speculative.\* The lower court refused to give any serious consideration to appellant's claim of price fixing. (Or. Op. 8.) On the evidence any such claim is not worthy of further discussion.

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\*Under the *Paramount* decision his admission price was specifically one of the elements to be considered in determining clearance and priority of run. (66 Fed. Supp. 323, 341, 342, 343; 334 U. S. 131, 145.)

IV.

**The Finding That There Was No Monopolization or Conspiracy to Monopolize Is Fully Supported by the Evidence.**

Appellant's claim that somehow Sanborn and Edwards constituted a monopoly and that their operations in El Monte were the result of an illegal conspiracy to monopolize in which the respondent distributors joined is without any support from either evidence or inference. The court found squarely that such a claim had no merit in the facts presented, and the finding is unassailable. [R. 150, 151, 153.] These two exhibitors were competitors for public patronage in the El Monte area and not very friendly ones at that. [R. T. 87, 750.] The contention that they either individually or together constitute some sort of octopus engaged in strangling Puente by the use of "buying power" is absurd on its face. Sanborn owned only the El Monte Theatre and the small, late-playing house in Baldwin Park. As far as Edwards is concerned he bought his pictures on a theatre-by-theatre basis with different prices and terms negotiated for each theatre. As the evidence showed, he was unable on many occasions to purchase pictures from various distributors for certain theatres because the terms he offered for those theatres were not satisfactory to the distributors. [R. T. 361, 689, 1449, 1452, 1489; Ex. QQ.] He was unable to improve his clearances in any situation, as he testified. [R. T. 1715, 1716.] Furthermore, his lack of any "buying power" influence on the distributors is demonstrated by the fact

that he was forced to resort to arbitration proceedings under the consent decree to get an availability from the majors for his Tumbleweed Theatre even as favorable as 28 days after Sanborn's El Monte Theatre (as contrasted with Puente's 7 to 14) and his requests for an earlier availability were summarily refused. [R. T. 1706.] The so-called "combination" of Edwards' theatres with those of other exhibitors to which appellant continually refers (Op. Br. 5, 29, 60) was nothing more nor less than the utilization by him and the other exhibitors of a single agent for buying and booking purposes for reasons of efficiency and economy, a device which is normal in the industry among independent operators.

There is not one iota of evidence in this record that either Edwards or Sanborn did, or in fact, could, follow the practice of "combining the theatres in closed towns with competitive situations" for the purpose of exerting improper purchasing power as asserted. (Op. Br. 60-63.) There were no "master" agreements or "formula deals." The testimony was explicit that both Edwards and Sanborn purchased their pictures on a theatre-by-theatre basis with separate terms negotiated for each theatre. [R. T. 72, 74, 362, 689, 1449, 1489, 1715.] Of course, after such negotiations had been completed, some of the distributors listed the individually negotiated terms on one sheet covering all of the various theatres for convenience rather than following the practice of other distributors

of making out a separate sheet for each theatre.\* But that is not a “master agreement.” The latter, as referred to in *U. S. v. Griffith*, 334 U. S. 100; *Schine v. U. S.*, *supra*, and *U. S. v. Paramount Pictures, Inc.*, *supra*, was condemned because terms for one theatre were expressly or impliedly contingent on the terms for another or because an operator received unreasonable or discriminatory preferences in a competitive situation through the use of his ability to refuse to buy in a non-competitive situation. There was no such evidence in this case. The record shows exactly to the contrary, and the court’s finding both in its opinion and in the formal finding of fact is explicit.

Appellant’s “buying power” argument is not new. It was advanced in the *Westway*, *Dipson* and *Windsor* cases where the defendant exhibitors occupied somewhat the same position as does Edwards here. It was dismissed with the finding in each case that no such power existed for reasons similar to those here given.

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\*An examination of the contracts themselves [Exs. 9A, 10A, 11A, 12A, 13A, 21A and 22A] will quickly dispose of appellant’s “combination” argument. They demonstrate that *all* terms were separate for *all* theatres involved. Except for Monogram, there are no overall commitments whatsoever.

V.

**The Finding That Appellant Has Not Been Damaged  
by Reason of the Acts of the Respondents Is Fully  
Supported by the Evidence.**

It is appellant's contention that his failure to secure a run prior to that of El Monte inevitably damaged him. The evidence showed to the contrary, and the trial court so found. [R. 153.] Ample evidence supports the finding.

As the trial court clearly recognized (Or. Op. 10) the product which appellant really wanted was that of the major companies which Sanborn licensed for his El Monte Theatre. As far as Columbia, Republic and Monogram were concerned his own testimony is practically a concession of that fact. [R. T. 1224, 1226-29; *Cf.* Ex. DD.] He therefore had to have the product sold to the El Monte Theatre to operate at all.

Certainly in all fairness appellant could not expect the distributors to give him the product in priority to Mr. Sanborn unless he was willing to pay for that product what Mr. Sanborn paid. Had he done so, by his own testimony he would have lost large amounts of money instead of making the profit that he did. His testimony was that if he had first run he would gross about \$600 in three or four days of operation [R. T. 1181], or \$1,200 a week. He also testified that even in his present playing position, his cost, exclusive of film rental, was \$750 per week, leaving a balance of \$450 for film rental and his own salary. [R. T. 1184.] He would be required from this sum to pay rental for at least two top features and two fillers

per week. The *average* film rental paid by Sanborn's El Monte Theatre for each of the 36 leading pictures which played there and also in Puente *was slightly over \$350 a picture*. (Appendix, Part D.) If appellant had grossed what he said he could gross and paid what El Monte paid, he would have suffered a loss of hundreds of dollars in every week of his operation.

In *Momand v. Universal Film Exchange* (D. C. Mass., 1947), 6 F. R. D. 409, 421, Judge Wyzanski discussed the holding of *Bigelow v. RKO*, 327 U. S. 251. He said there:

“ . . . Thus the *ratio decidendi* of the Bigelow case is that *where the evidence in an Anti-trust case is such that the discrepancy between plaintiff's earnings and a competitor's earnings or between plaintiff's earnings in one year and another year could be found by a jury to be entirely unexplained except by acts of defendants which are unlawful under the Anti-trust laws* THEN the jury may find defendants are the jural cause of the discrepancy, that is, of the loss.”

Puente's failure to gross what the El Monte Theatre grossed is clearly due to its lack of anywhere near the grossing potential enjoyed by its competitors. Its position in the scheme of things is well shown by Exhibit PP showing that it played the picture “Pale Face” (which it got 7 days after El Monte) *ninth* in a group of twenty-three San Gabriel Valley theatres, while its percentage re-

turn, based on its gross, was *twentieth*.\* That lack of grossing potential was due to the nature of the community itself, lack of accessibility, its heavy percentage of Spanish speaking inhabitants, and the other factors we have pointed out—not *solely* or even to any great extent to the timeliness of the pictures it played. (Appendix, Part B.) The testimony was that an earlier playing position, while it might increase the gross, would do so only slightly. [R. T. 1443, 1460, 1643.] Appellant was offered the opportunity to play ahead of El Monte if he would pay for it, and he declined to accept the offer. [R. T. 470, 564; Ex. S.] Had he done so, it would have ruined him. Consequently, he has suffered no damage by failing to receive that position.

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\*In fact, it *grossed* on the picture only \$46.00 more than El Monte paid for film rental! (Cf. Appendix B.)

VI.

**There Was No Error in Denying Appellant a New Trial.**

The question of whether a new trial should be granted is a matter of the exercise of sound discretion by the trial court, which discretion will not be upset unless it has been abused. (*Fairmont Glass Works v. Cub Fork Coal Co.* (1933), 287 U. S. 475; *Allison v. Standard Air Lines* (9th Cir., 1933), 65 F. 2d 668.) In this case we need say very little about the fact that the discretion was soundly exercised. The first ground upon which a new trial was demanded was the fact that on June 6, 1950, the Supreme Court denied a review of the final judgment in the case of *U. S. v. Paramount Pictures, Inc.*, *supra*, and appellant argues that this fact alone should require the trial court to reopen the entire matter for a further hearing. The claim is patently without merit. All of the law established by *U. S. v. Paramount* was before the trial court at the time it gave its oral opinion in the case on October 20, 1949. The original decision of the Expediting Court (66 Fed. Supp. 323) which in and of itself passed upon all the problems here involved and remained unchanged in that respect by later developments, was filed June 11, 1946, long before appellant had ever begun construction of his theatre. The only Supreme Court opinion in the case was delivered May 14, 1948 (334 U. S. 131), within a few months after the theatre was opened. The second and final opinion of the Statutory Court was delivered July 25, 1949 (85 Fed. Supp. 881), just after the close of the evidence in this case and while the matter was being briefed. It was discussed at length in the briefs. The final decree of the Statutory Court was dated February 8, 1950, approximately three months before the



findings of fact and judgment were entered in this case. All parties conceded that the various opinions in the *Paramount* case represented the law, and they were argued at length during the trial and in the briefs. All that happened after the judgment herein was the *per curiam* refusal by the Supreme Court to again review the matter issued in June, 1950 (340 U. S. 803), and its denial of a petition for rehearing in October of the same year (340 U. S. 857).

Hence there was nothing in the *Paramount* case which was not already fully familiar to the court when it decided this case.

Appellant's argument that the case should be reopened so that the *Paramount* decree might be placed in evidence is wholly without merit for a number of equally sufficient reasons:

(1) The findings of fact and conclusions of law on which the decree was entered specifically speak as of the year 1945, which was long before appellant's theatre was ever erected. [See Findings of Fact, *U. S. v. Paramount*, C. C. H. Tr. Reg. Rep. p. 63,675.]

(2) The court refused to find that in any individual situation there were improper discriminatory practices in runs and clearances (66 Fed. Supp. 323, 342), and as above demonstrated the only "systems" of runs and clearances considered illegal were those which flouted rather than followed economic principles. The decisions are uniform that the *Paramount* decree is not evidence of the illegality of any particular individual method. *Fifth & Walnut v. Loew's, Inc.*, *supra*; *Windsor v. Walbrook Amusement Co.*, *supra*;

and *Fanchon & Marco v. Paramount Pictures, Inc.*, *supra*, specifically so hold.

(3) The only statutory effect given a decree such as the *Paramount* decree is that of *prima facie* evidence. (15 U. S. C. A., Sec. 16.) This case had been completely tried. On appellant's evidence, the court held he had made out a *prima facie* case [R. T. 1388], but held that the respondents' evidence overcame such case. Nothing could be added by the *Paramount* decree to what appellant had already purported to establish by the testimony.

(4) As far as respondents Paramount and RKO were concerned they were not parties to the final decree, but were parties to consent decrees which specifically provided that they did not adjudicate the issues of fact in the complaint. (C. C. H. 1948 Trade Cases, Nos. 62,335, 62,377.) As far as Republic and Monogram were concerned, they were not parties in any proceeding in *U. S. v. Paramount*.

(5) In the absence of uniformity of parties defendant the decree was not admissible. (*Proper v. John Beane & Sons, Inc.*, 295 F. 2d 795 (E. D. N. Y., 1923).)

For all the foregoing reasons which we think need no further argument the court was, to say the least, justified in not granting a new trial merely because of the fact that after the judgment had been filed herein the Supreme Court denied a review in the *Paramount* case.

The other ground presented by the supplemental motion was an even more fantastic one. Appellant claimed that because there had been changes in the method of distribution of motion pictures in the particular area *after* the

judgment had been rendered herein he should be entitled to a new trial on the theory that such constituted an "admission" by the respondents that what they had theretofore done was illegal. If there were any soundness in appellant's position, there would never be an end to litigation. Of course there is no such soundness. In the first place, any evidentiary matters which occur after the trial has been finished and judgment rendered is not "newly discovered evidence" within the rule. (*Federal Practice & Procedure*, by Baron & Holtzoff, Vol. 3, page 288 (Par. 1305); *Campbell v. American Foreign S. S. Corporation* (2nd Cir., 1941), 116 F. 2d 926; *U. S. v. Branson*, 142 F. 2d 232, 235.) Evidence of a change in practices would have been no evidence whatsoever of any conspiracy in any event. This was specifically held in *Windsor Theatre Co. v. Walbrook Amusement Co.* (D. C. Md., 1950), 94 Fed. Supp. 388; affirmed (4th Cir., 1951), 189 F. 2d 797. As a matter of fact most courts even refuse to admit such evidence as to changes on the ground that such evidence in no way goes to prove that previous practices were other than wholly proper. (*Halling v. Shindler*, 145 Cal. 303, 312; *Gorman v. County of Sacramento*, 92 Cal. App. 656, 665.) Furthermore, as is shown by the Affidavit in Opposition to Motion for New Trial [R. 182] the changes had nothing whatever to do with the fact that the *Paramount* case was denied review by the Supreme Court in June, 1950, or constituted in any way any indication that the position taken by the distributors theretofore had been improper. The changes which occurred proved exactly what respondents had always contended, that rather than there being any "fixed" system, the system was in flux and affected by changing conditions. The affidavit shows that changes

occurred because of the advent into the area of three large, new drive-in theatres presenting novel problems in connection with the distribution of motion pictures and by the fact that drive-in theatres and other exhibitors requested of the various distributors the right to "bid" for the playing position, a request which had not theretofore been made.

The court's opinion denying a new trial shows clearly that as far as the salient elements of the case were concerned it was of the same opinion still. The "newly discovered evidence," both as to the action of the Supreme Court in the *U. S. v. Paramount* case and as to the alleged changes in the distribution practices after the decision in this case, certainly gave no valid ground for the granting of appellant's motion. None of appellant's cases indicate the propriety of a contrary ruling.

### Conclusion.

The court's findings of fact are directly to the point. Only if they were "clearly erroneous" could they be set aside. With respect to each finding support is found in ample, substantial and credible record evidence. The court's judgment is in accord with all the decided cases, including the most recent determinations upon parallel facts. It should be affirmed.

Respectfully submitted,

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FRESTON & FILES,  
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## APPENDIX.

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### PART A.

#### Factual Errors Appearing in Appellant's Opening Brief.

1. P. 5, line 3: Edwards "operated or controlled the licensing of film for from 30 to 45 theatres in Los Angeles County." (See also p. 16, line 7; p. 19, line 11; p. 60, line 9.)

Edwards operated or controlled about 17 theatres.  
[R. T. 49; *Cf.*, R. T. 51-53.]

2. P. 5, line 5: Edwards "regularly licensed pictures in a single contract for showing in from 20 to 30 of such controlled theatres."

The documents [Exs. 9A, 10A, 11A, 12A, 13A, 21A, 22A] show the agreements were separate for each theatre involved. Most of them specifically so state, *e. g.*, Fox, "If two or more features are licensed herein for two or more theatres named herein it is simply for convenience, and this application is a separate application for each picture for each theatre. The rules of this company (1) require the license for each feature to be separately negotiated for each theatre . . . and (3) forbid the conditioning of one license on another." [Ex. 21A.]

3. P. 6, line 16: "Of the theatres above-named [9 theatres] the Puente Theatre is superior to all except the El Monte Theatre [Ex. Z; F. F. VI]." P. 36, line 24; p. 37, line 3: ". . . the court found . . . that the Puente Theatre was the newest and most modern theatre

in the area and was superior to all such theatres excepting only the El Monte Theatre.”

There was no such evidence or finding. The court found with respect to appellant’s theatre “as to its physical appointments, in comparison with *the three theatres* with which it is in substantial competition, it is exceeded in superiority only by the El Monte Theatre.” [R. 148.] The “three theatres” were the Valley, El Monte, and Tumbleweed. [R. 140.]

4. P. 10, line 19: “All three of these theatres . . . had enjoyed a fixed playing position of 14 days after first run closing in Pasadena.”

On product played by Sanborn, Edwards’ playing position in the El Monte area was “fixed” at 28 days after the El Monte Theatre by the arbitration decree. [R. T. 1706; *cf.* 641, 643, 1538.]

5. P. 10, line 14: “. . . Edwards . . . demanded . . . a protective clearance in favor of the small Valley Theatre, in El Monte . . .” (See also p. 11, line 3.)

Edwards asked a clearance in favor of his “El Monte situation” which consisted of the Valley and Tumbleweed Theatres. [Ex. 3.]

6. P. 10, line 25: “. . . Southern California Amusement Co., Inc. (the licensing agent for all Edwards Theatres and other theatres in the area) . . .” (See also p. 60, line 22.)

There is no evidence that any theatre “in the area” other than the “Edwards Theatres” was represented by this company.



7. P. 11, lines 17-23: Appellant states that the respective distributors had “restricted” their product to the Sanborn theatres as regards those distributors licensing him and the Edwards theatres as regards those distributors licensing them.

There was no “restriction.” The reason why Sanborn was able to buy the major product and Edwards had to rely on the product of the minors are disclosed in our brief. [See also attempts of minor distributors to sell Sanborn; R. T. 102-03, 199; Cf. 597, 750, 1705, 1771-74.]

8. P. 13, line 21: “Columbia, Universal and other distributors stated flatly that the playing position awarded to plaintiffs by these companies would be the same as the position awarded to him by their competitors. [R. T. 909, 916.]”

This is *appellant's* testimony as to what the *Universal* representative told him. Such statement was denied by that representative. [R. T. 1837; cf. R. T. 1831-34.] The testimony of the other distributors shows no such statement was made by any of them. [R. T. 295-96, 394, 397, 531, 584-85, 587, 593, 1142, 1150, 1583, 1607, 1757, 1806, 1824, 1837.]

9. P. 13, line 24: “The above testimony clearly establishes without substantial dispute the following facts” followed by two pages of items.

Neither the “above testimony” or any testimony in the case “establishes” such “facts,” as is demonstrated in our brief. Appellant proposes to prove conspiracy by his own *ipse dixit*.

10. P. 15, line 16: "The statement attributed to Mr. Carmichael of Republic at R. T. 930 to the effect that Republic could give no better playing position than was given by other distributors . . . is typical of the response of many, if not all, of the distributors contacted by plaintiffs prior to the opening of the Puente Theatre."

The statement is, of course, "attributed" by appellant himself and is denied by Carmichael. [R. T. 1803-06, 1808, 1814.] Republic, as one of the weakest companies, was prepared to meet competition. [R. T. 1817.] Appellant gives no record reference to statements by other distributors and their testimony discloses no such statements.

11. P. 15, line 22: Appellant refers to the "absolute admission of defense counsel . . . in regard to the fixed noncompetitive nature of the pattern of distribution, contained in R. T. 350."

The "admission" was a statement to the effect that clearance is given to protect the prior licensee, which is exactly what is declared to be legal and essential by the Expediting Court in *U. S. v. Paramount Pictures, Inc.*, 66 F. Supp. 323, and by the United States Supreme Court in the same case, 334 U. S. 131, and in *Schine Theatres v. U. S.*, 334 U. S. 110.

12. P. 17, line 20: "Collins of Republic testified that plaintiffs had never been given right to compete."

No record reference is given, and we are positive that there is no such testimony.

13. P. 18, line 20: "From February 20, 1948, to March 31, 1949, Puente paid Monogram a total rental of \$630.52 for last run privileges compared to the rentals of the protected Valley Theatre of only \$437.50 for a first and protected run."

Appellant gives no intelligible record reference for his figures. Monogram's cut-off cards [Exs. 170, 172] show Puente paid \$678.02 for 28 pictures (including "The Babe Ruth Story," \$118.02); Valley paid \$626.50 for 22 pictures. Valley paid more to Monogram for every picture played than did Puente. Excluding "The Babe Ruth Story" the average per picture for Puente was \$20.09, for Valley \$28.50. The price indicates the quality of the pictures.

14. P. 30, line 4: ". . . the playing position of each said theatre was made dependent not upon the playing of a picture in a directly competing theatre in the immediate area, but upon the exhibition of pictures in Pasadena and Alhambra . . . each enjoyed a playing position independent of and free from the control of any immediately competitive theatre."

The theatres within the Alhambra orbit were subject to a clearance in favor of the Alhambra theatres. The theatres in the Pasadena orbit were subject to a clearance in favor of Pasadena. Temple City was subject to a clearance in favor of San Gabriel which itself was subject to a clearance in favor of Alhambra. Similarly Puente was subject to a clearance in favor of the El Monte theatres, which were themselves subject to a clearance in favor of Pasadena. All were treated alike.

15. P. 31, line 11: "The intent of *Warners and Paramount* is further established by the testimony of the witness Greenburg . . . and by . . . letter . . . to Paramount Pictures from the defendant Sanborn."

Aside from the fact that the testimony quoted does not tend to prove what appellant says it does, it could not possibly affect Paramount since Greenburg was an official of Warner's and the testimony concerned only the manner in which *Warner's* distributed its pictures.

16. P. 32, line 18: "Mr. Cohen of RKO admitted in response to the court's questions that . . . had the Puente Theatre been owned by Edwards, no protective clearance would have been set up. [R. T. 353-354.]"

Mr. Cohen testified *exactly to the contrary*. We quote [R. T. 354-55]:

"The Court: In other words, if Mr. Edwards owned the Puente Theatre you wouldn't be interested in the clearance, would you?

. . .

The Witness: I would be interested in clearance, yes.

The Court: But you would let Mr. Edwards arrange the clearance himself, would you not?

The Witness: No, I wouldn't, because I don't think Puente could return as much money to me as either Tumbleweed or El Monte could."

17. P. 34, line 21: "Being denied all pictures until the protected Valley Theatre and all other theatres in the area had played them Puente nevertheless *did in fact* pay total film rentals during the period of \$18,860 for a non-competitive last run in the entire area."

(1) Practically the only pictures playing the Valley ahead of Puente were those of RKO, Columbia, Monogram and Republic. (2) Puente played ahead of many theatres on many top pictures and paid less [see Br. p. 43 and Ex. PP]. (3) Appellant's figure includes \$5,114.19 paid for Spanish pictures to non-defendant distributors.

18. P. 35, line 1: "This amount was more than was paid by any theatre in that area for first-run privileges . . ."

In what area? Appellant uses the word "area" to suit his purpose. If he means to include in the "area" the theatres he lists on page 7 of his brief his statement is entirely erroneous, as the evidence showed that Monterey Park, Rosemead and El Monte paid more, Covina paid substantially more on pictures distributed by the respondents, and there was no evidence as to either the Garvey or Azusa theatres. Our within brief demonstrates the misleading nature of appellant's figures.

19. P. 46, line 19: "The court further found in the *Goldman* case that the first run theatres then enjoying the monopoly were superior to plaintiffs' . . . Theatre."

The court found that plaintiff's theatre was larger than some of the Warner's theatres; that "its appointments are quite as elegant as any of the Warner's

theatres”; that it was located with one block of an important Warner’s theatre; that its inability to obtain product “was not based on its lack of fitness”; that it offered more money for the pictures, and that “if it had been a Warner’s theatre they would have leased plaintiff the pictures it sought.” (150 F. 2d 738, 742.)

20. P. 49, line 20: “. . . as admitted and affirmatively stated by defendants, there is an actual surplus of film.”

No reference is given. In fact, while Columbia testified it had no print shortage [R. T. 303] other distributors testified that there was a very acute shortage of prints during the time when pictures became “available” to appellant. [R. T. 197, 229, 609.]

21. P. 66, line 18: “. . . by comparing the grosses of the Tumbleweed Theatre (which the Court held to be comparable to the Puente Theatre) of \$79,207.95, to those of the Puente Theatre of \$56,669.51, an adjustment of rentals would appear to be in favor of the latter theatre since it paid much higher gross rentals for stale pictures on a non-competitive run than did the Tumbleweed Theatre for first and non-discriminatory exhibition rights in the competitive area.”

(1) The court did not hold the Tumbleweed “comparable” except as to physical appointments. To the contrary as to location and accessibility it was held superior. (Or. Op. 12, 13, 15.)

(2) The figures for Puente’s grosses includes grosses of Spanish pictures, not here involved, which amounted to about \$10,000. [Ex. DD, Br. p. 47];

(3) The Tumbleweed paid about 100% more in gross rentals on pictures it played ahead of Puente than did Puente on the same pictures. (Br. p. 50.)

22. P. 68, line 1: "This reformation in the former fixed system occurred immediately subsequent to the final affirmation of the Findings, Conclusions and Decision of the Expediting Court in the *Paramount* case . . . ." (See also p. 75, line 25: "The condemned system began to be abandoned only after June 5, 1950—".)

Respondents' affidavit shows that the statement is entirely false. Most of the changes occurred long before the final action in *U. S. v. Paramount* and that action had no effect thereon. [R. 183, lines 10, 17; 184, lines 6, 11; 195, lines 1, 5, 9, 20; 186, line 1.]

23. P. 68, line 6: "In response to the latter motion, defendants filed their counter affidavit *admitting* the basic facts so alleged."

The court can determine the incorrectness of this statement by merely reading the affidavit in R. 182-89.

24. P. 68, line 18: ". . . it would seem that . . . the trial court had determined to reverse its original judgment regarding its basic holdings on conspiracy . . . ."

The trial court said "I have concluded that I could not in good conscience change my original findings on conspiracy. With all the arguments of counsel and his affidavits of subsequent events I still hold to my original conclusion." [R. 190.]

25. P. 77, line 11: "Only two replies to plaintiff's written request were received . . ."

Four replies were admittedly received, three in writing [RKO, Ex. 84, Loew's, Ex. 115, and Fox, Ex. 162] and one orally. [Paramount, R. T. 1315.]

26. P. 79, line 13: ". . . the trial court's conclusions during the actual course of the trial were contrary to the ultimate holdings of the court arrived at approximately 18 months after the actual trial of the case . . ."

The taking of evidence ended May 24, 1949. The findings made herein accurately express the court's decision given from the bench October 20, 1949, after the evidence had been compiled and reviewed by both parties in comprehensive briefs. (Or. Op.)



## PART B.

able Showing 26 pictures grossing largest amounts in Puente Theatre from opening of theatre to time of trial, exclusive of Tuesday or Saturday programs. Data Compiled from Defts. Exs. N, O, P, Q, T, V, W, X, DD, HH, KK, and Plaintiff's Exs. 34, 44, 59, 89, 105, 120, 139, 155, 172, 176.

Order	Picture	Dist.	Units Played	Gross	Days played after close in El Monte
1.	Red River	U-A	3	\$ 504.68	Ahead
2.	Command Decision	Loew's	4	481.26	Ahead
3.	Road to Rio	Par.	4	458.84	12 days
4.	Snake Pit	Fox	4	452.14	18
5.	Pale Face	Par.	3	449.00	7
6.	Three Musketeers	Loew's	4	440.02	17
7.	Johnny Belinda	W.B.	3	416.86	30
8.	Gone With Wind	Loew's	3	410.08	Ahead (Reissue)
9.	Emperor Waltz	Par.	4	385.64	21
10.	Body and Soul	U-A	3	373.44	Ahead
11.	Babe Ruth Story	Mono.	4	371.04	Ahead
12.	When My Baby Smiles	Fox	4	370.14	26
13.	Hills of Home	Loew's	4	368.74	7
14.	Bambi	RKO	3	359.32	17
15.	Julia Misbehaves	Loew's	4	353.20	Ahead
16.	Loves of Carmen	Col.	4	348.66	85
17.	Gentlemen's Agreement	Fox	4	341.26	18
18.	Words and Music	Loew's	4	335.44	Ahead
19.	Mother Wore Tights	Fox	4	334.04	18 months
20.	Saigon	Par.	4	328.92	7 days
21.	Green Grass of Wyoming	Fox	4	326.20	21
22.	Good News	Loew's	4	325.40	48
23.	Captain From Castile	Fox	4	324.78	11
24.	Wild Irish Rose	W.B.	4	324.02	11
25.	Southern Yankee	Loew's	4	318.58	35
26.	Call Northside 777	Fox	3	317.64	0
Total Units and Gross			97	\$9,819.34	

NOTE 1: List does not include Puente opening (Picture: "Wild Harvest"; Gross \$417.22); nor the Armistice Day American Legion Stage and Screen Show (Picture: "Good Sam"; Gross \$485.54), since such grosses have little to do with the picture showing and are hence misleading.

NOTE 2: The word "Ahead" means either that Puente played before the El Monte theatres or that none of the El Monte theatres played the picture.

NOTE 3: "Call Northside 777" played immediately following El Monte close.

Average based on all films shown. Figures in parentheses show number of pictures played.

1.

<u>Distributor</u>	<u>Puente Theatre</u>	<u>El Monte Theatre</u>
Fox	(36) \$46.05	(33) \$183.55
Loew's	(28) 71.16	(27) 275.71
Paramount	(25) 49.97	(25) 222.03
Warner's	(16) 55.62	(14) 241.60
Universal	(14) 38.32	(13) 183.07
United Artists	(14) 39.53	(8) 119.38
	<hr/>	<hr/>
	(133) \$51.34	(120) \$214.74
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2.

Distributor	Puente Theatre		Valley Theatre		Tumbleweed Theatre		Combined Valley-Tumbleweed
RKO	(36)	\$42.66	(29)	\$90.27	(28)	\$116.95	\$207.22
Columbia	(59)	28.67	(49)	44.12	(54)	44.73	88.85
Republic	(25)	17.80	(11)	26.36	(14)	30.36	56.72
Monogram	(38)	21.59	(35)	25.30	(37)	28.20	53.50
Total Averaged	(158)	\$28.43	(124)	\$48.03	(133)	\$53.83	\$101.86

## PART D.

Table showing comparison Puente gross and film rental with rentals paid by El Monte Theatre on 36 leading pictures from Loew's, Paramount, Fox and Warner's, which played both theatres, El Monte ahead of Puente, up to date of complaint. Data Compiled from Defts. Exs. Q, T, W, X.

Picture	Puente Gross	Puente Film Rental	El Monte Theatre Film Rental
<i>Loew's</i>			
Good News	\$ 325.40	\$ 108.64	\$ 265.00
Green Dolphin Street	300.20	120.08	503.78
Cass Timberlane	268.36	107.34	527.47
3 Daring Daughters	305.90	62.50	300.00
Bride Goes Wild	284.50	62.50	300.00
State of Union	220.32	88.13	345.18
The Pirate	275.86	62.50	300.00
Home Coming	244.84	87.94	576.45
On an Island With You	269.28	110.00	187.84
Easter Parade	239.66	110.00	290.48
Date With Judy	271.16	143.00	292.47
Southern Yankee	318.58	62.50	300.00
Julia Misbehaves	353.20	110.00	255.73
Three Musketeers	440.02	110.00	439.84
<i>Paramount</i>			
Road to Rio	458.54	183.54	357.59
Albuquerque	287.72	35.00	250.00
Saigon	328.92	50.00	350.00
Big Clock	210.62	50.00	350.00
Emperor Waltz	385.64	148.26	400.24
Foreign Affair	178.10	65.00	350.00
Unconquered	292.66	110.06	505.51
Beyond Glory	309.86	65.00	350.00
Sorry Wrong Number	243.04	50.00	350.00
<i>Twentieth Century-Fox</i>			
Daisy Kenyon	247.90	61.97	300.00
Captain from Castile	324.78	129.91	454.40
Northside 777	317.64	119.06	343.13
Gentlemen's Agreement	341.26	129.50	358.78
Iron Curtain	236.48	72.27	325.00
Green Grass of Wyoming	326.20	73.10	300.00
Apartment for Peggy	275.84	60.00	356.28
<i>Warner Bros.</i>			
Wild Irish Rose	324.02	129.61	427.20
Sierra Madre	296.16	90.00	385.38
Voice of Turtle	224.10	75.00	328.93
Key Largo	290.82	110.33	390.88
Silver River	266.76	75.00	300.00
Romance on High Seas	203.78	75.00	300.00
<b>TOTAL</b>	<b>\$10,488.12</b>	<b>\$3,243.74</b>	<b>\$12,717.56</b>















